Supreme Court, U.S.
FILED
00 309 AUG 23 2000
OFFICE OF THE CLERK

NO. _____

In the Supreme Court of the United States

October Term 2000

SYRACUSE EXPLORATION COMPANY,

Petitioner

vs.

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANGINO & ROVNER, P.C.
RICHARD C. ANGINO
I.D. No. 07140
Attorneys for Petitioner
Syracuse Exploration Company

4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791

Clare Printing, Box 100, Sayre, PA 18840—(570) 888-2244

127PP

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Is it reversible error for a trial judge to permit an attorney expert to express legal opinions over opposing counsel's objections?

II. Does a party waive his right to object by failing to except or object to the trial judge's charge under the circumstances where the trial judge refused to hold a pre-charge conference, failed to rule on submitted points for charge, and failed to instruct the jury with respect to points for charge submitted by counsel?

III. Is it reversible error for the trial court to sanction counsel by precluding expert testimony because of the belated filing of an expert report under circumstances where the Circuit required "prejudice" and no "prejudice" was shown?

IV. Is it reversible error for a trial court to preclude reference to an insurance carrier's cancellation/refusal to renew as a possible act of "bad faith" in an insurance "bad faith" case?

V. Is it reversible, prejudicial error to grant partial summary judgment and a motion in limine removing from the jury's consideration contractual issues and evidence of consequential damages and/or lost profit based upon contract issues when the complaint seeks both contractual and bad faith damages and where the state law provides for different burdens of proof with respect to contract and "bad faith" issues?

CORPORATE DISCLOSURE STATEMENT

Petitioner discloses that there is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Statement of the Questions Presented for Review i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Citations v

Petition 1

Reference to the Opinions Delivered in the Courts Below 2

Statement of Jurisdiction 3

Statutory Provisions Involved 4

Statement of the Case 5

Reasons for Allowance of the Writ 7

I. It Is Reversible Legal Error For A Trial Judge To Permit An Attorney Expert To Express Legal Opinions Over Opposing Counsel's Objections 11

II. A Party Does Not Waive His Right To Object By Failing To Except Or Object To The Trial Judge's Charge Under The Circumstances Where The Trial Judge Refused To Hold A Pre-Charge Conference, Failed To Rule On Submitted Points For Charge, And Failed To Instruct The Jury With Respect To Points For Charge Submitted By Counsel 12

III. It Is Reversible Error For The Trial Court To Sanction Counsel By Precluding Expert Testimony Because Of The Belated Filing Of An Expert Report Under Circumstances Where The Circuit Required "Prejudice" And No "Prejudice" Was Shown 15

IV. It Is Reversible Error For A Trial Court To Preclude Reference To An Insurance Carrier's Cancellation/Refusal To Renew As A Possible Act Of "Bad Faith" In An Insurance "Bad Faith" Case 16

V. It Is Reversible, Prejudicial Error To Grant Partial Summary Judgment And A Motion In Limine Removing From The Jury's Consideration Contractual Issues And Evidence Of Consequential Damages And/Or Lost Profit Based Upon Contract Issues When The Complaint Seeks Both Contractual And Bad Faith Damages And Where The State Law Provides For Different Burdens Of Proof With Respect To Contract And "Bad Faith" Issues 17

Conclusion 18

APPENDIX:

Order of the United States Court of Appeals for the Third Circuit Sur Petition for Rehearing dated June 20, 2000 ..... 1a

Panel Opinion of the United States Court of Appeals for the Third Circuit dated May 26, 2000 ..... 2a

Trial Court Memorandum Opinion for the Middle District of Pennsylvania dated September 28, 1999 ..... 16a

Trial Court's Order for the Middle District of Pennsylvania dated June 3, 1999 ..... 26a

Trial Court's Order for the Middle District of Pennsylvania dated December 31, 1998 ..... 27a

Trial Court's Order for the Middle District of Pennsylvania dated April 29, 1998 ..... 29a

Relevant portion of trial transcript dealing with testimony of lawyer/expert 30a

Relevant portion of trial transcript dealing with the trial court's failure to hold a pre-charge conference regarding plaintiff's points for charge and the trial court's charge 75a

TABLE OF CITATIONS

CASES:

A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 612 F. Supp. 760 (W.D. Va. 1985) 12, 13, 14, 17

Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. (Md.) 1986) 8

Askanase v. Fatjo, 130 F.3d 657 (5th Cir. (Tex.) 1997) 8

Ballow v. PHICO Ins. Co., 875 P.2d 1354 (S.Ct. (Colo.) 1993) 16

Bergman v. United Services Automobile Association, 742 A.2d 1101 (Pa. Super. 1999) ..... 8.

Burkhart v. Washington Metropolitan Area Transit Auth., 112 F.3d 1207 (D.C. Cir. 1997) 8

Doylestown Electrical Supply Co. v. Maryland Cas. Ins. Co., 942 F. Supp. 1018 (E.D. Pa. 1996) 10

Endress + Hauser, Inc. v. Hawk Measurement Systems Pty. Ltd., 122 F.3d 1040 (C.A.Fed. (Ind.) 1997) .. 8

Harbor Ins. Co. and Allstate Ins. Co. v. Continental Bank Corp., 922 F.2d 357 (7th Cir. (Ill.) 1990) ... 8

Helfand v. National Union Fire Ins. Co. of Pittsburgh, Pa., 10 Cal. App. 4th 869, 13 Cal. Rptr.2d 295 (1992) 16

Hindman Transfer & Storage Inc. v. PMA Group, 31 D.& C. 4th 55 (C.P. Butler 1996) 17

Jung v. Nationwide Mut. Fire Ins. Co., 949 F. Supp. 353 (E.D. Pa. 1997) 17

Marx & Co. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir. 1977) 7

Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3d Cir. 1977) 9, 10, 16

Nealy v. State Farm Mut. Auto. Ins. Co., 695 A.2d 790 (Pa. Super. 1997) 10

Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92 (1st Cir. Puerto Rico 1997). 7

O'Donnell v. Allstate Ins. Co., 734 A.2d 901 (Pa. Super. 1999) 12

Ohio Cas. Ins. Co. v. Travelers Ins. Co., 667 F. Supp. 222 (W.D. Pa. 1987). 16

Parsaie v. United Olympic Life Ins. Co., 29 F.3d 219 (5th Cir. (Tex.) 1994) 17

PepsiCo, Inc. v. Continental Cas. Co., 640 F. Supp. 656 (S.D.N.Y. 1986). 17

Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524 (3d Cir. 1997) 10

Specht v. Jensen, 853 F.2d 805 (10th Cir. (Colo.) 1988) .. 8

Spindle v. Travelers Ins. Co., 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977) 16

Timmons v. Royal Globe Ins. Co., 653 P.2d 907 (Okla. 1982). 17

U.S. v. Zipkin, 729 F.2d 384 (6th Cir. (Ohio) 1984). 8

United States v. Newman, 49 F.3d 1 (1st Cir. 1995) ... 7

Waldon v. Cotton States Mut. Ins. Co., 481 So.2d 340 (Ala. 1985). 16

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985). . 9

STATUTES:

28 U.S.C. 1254(1) 3

42 Pa. C.S.A. §8371 ..... 4, 5

Pennsylvania Automobile Insurance Cancellation Law:

40 P.S. §1008.1, et seq. (repealed); now 40 P.S. 991.2001, et seq. 4, 16

Pennsylvania Unfair Insurance Practices Act:

40 P.S. §1171.1 ..... 4, 12, 16

RULES:

Fed.R.Civ.P. 46 9

Fed.R.Civ.P. 51 and 59(c) 4, 9

OTHER AUTHORITIES:

33 Fed. Proc., L.Ed 77:228 9

33 Fed. Proc., L.Ed. 77:230 9

Petition

IN THE SUPREME COURT OF THE UNITED STATES

SYRACUSE EXPLORATION COMPANY,

Petitioner,

v.

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

Reference is made to the June 20, 2000, Order of the United States Court of Appeals for the Third Circuit denying the Sur Petition for Rehearing (App. 1a), the Panel Opinion of the United States Court of Appeals for the Third Circuit filed May 26, 2000 (App. 2a), affirming the Memorandum Opinion of the United States District Court for the Middle District of Pennsylvania dated September 28, 1999 (App. 16a). Reference is further made to the Trial Court's Order of June 3, 1999, excluding evidence related to defendant's non-renewal of plaintiff's insurance policy (App. 26a), the Trial Court's Order of December 31, 1998, sanctioning counsel by excluding the use of an expert because of the belated filing of an expert report (App. 27a), the Trial Court's Opinion and Order of April 29, 1998, first denying the Motion for Partial Summary Judgment and then granting Partial Summary Judgment on December 31, 1998 (App. 29a and 27a, respectively).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit denying Syracuse Exploration Company's Petition for Rehearing *En Banc* was entered on June 20, 2000. Jurisdiction in this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This diversity "bad faith" case arises under the Pennsylvania Bad Faith Statute, 42 Pa. C.S.A. §8371. Also relevant are the Pennsylvania Automobile Insurance Cancellation Law, 40 P.S. §1008.1, *et seq.* (repealed) now 40 P.S. 991.2001, *et seq.*; The Pennsylvania Unfair Insurance Practices Act, 40 P.S. §1171.1; and Fed.R.Civ.P. 51 and 59(c).

STATEMENT OF THE CASE

This case involves Plaintiff Syracuse Exploration Company ("Syracuse") which insured a specialty piece of equipment, a "drill rig", which was not easily replaced, important to Syracuse's business, and particularly important in bidding on contracts. Insurance on the drill rig was provided through Respondent Northbrook Property and Casualty Insurance Company.

The drill rig was damaged by fire on *December 13, 1996*. A loss claim was filed within three days on *December 17, 1996*, but despite numerous faxes, telephone calls, correspondence, etc., Syracuse was unable to get Northbrook to make a decision to repair or replace the damaged rig *until March 26*, 1997. *The decision to repair rather than replace was made solely to save Northbrook a few dollars*. In the meantime, Northbrook canceled or refused to renew Syracuse's insurance policy.

In June of 1997, Northbrook sought to deduct depreciation. *The propriety of deducting depreciation and the insistence upon a general release that would have released Syracuse's bad faith claim* resulted in an additional delay until September 3, 1997, when Syracuse finally received its repaired rig.

Syracuse's complaint alleged *contractual* damages, including depreciation, deduction for partial loss, losses for business interruption, loss of profits, and storage fees. Plaintiff *also* claimed bad faith damages under 42 Pa. C.S.A. §8371.

Although Plaintiff's complaint sought both contractual and bad faith damages and sought recovery based upon contractual and bad faith legal principles, the trial court first denied and then granted summary judgment as to the contractual claims. The trial court then sanctioned Syracuse's counsel's

belated filing of an expert report by precluding expert testimony. On the eve of trial, the trial court granted Northbrook's motion in limine to preclude reference to Northbrook's cancellation/non-renewal as a potential act of bad faith. During the trial, the trial court, over Plaintiff's objections, permitted Northbrook's legal/scholar expert to express opinions as to what is or is not bad faith.

Finally, at the end of the trial, the trial court refused to hold a pre-charge conference, failed to rule on the parties' points for charge, and failed to instruct the jury in accordance with Syracuse's suggested points for charge.

REASONS FOR ALLOWANCE OF THE WRIT

Like products liability law in the 1960s, no-fault law in the 1970s and 1980s, motor vehicle financial responsibility law in the 1980s, bad faith law is the developing law in the 1990s and the beginning of the new millennium.

Since bad faith law involves an insured and an insurer, and since the vast majority of insurance companies are citizens of states other than the locus state, and since for a variety of reasons insurance companies have been removing state-instituted actions to federal courts, bad faith law has been developing in the federal courts rather than the state system. District courts and the Third Circuit have had to predict on numerous occasions what the Supreme Court of Pennsylvania would do with numerous issues that have not as yet been addressed.

The instant case involves a variety of issues common to bad faith actions, which either have not as yet been addressed by Pennsylvania appellate courts or, if addressed, the district court and the Third Circuit Panel in this case have decided the issues differently from the state appellate courts and/or appellate courts from other states and Circuits.

In the instant case, a panel of the Third Circuit decided the issue of the admissibility of lawyer/expert testimony contrary to eight Circuits (App. 10a). In the other eight Circuits, lawyers cannot be called to testify as to the "law." The trial judge in the other eight Circuits is the only expert *on the law* to whom the jury should receive instructions as to the "law." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92 (1st Cir. Puerto Rico 1997); *United States v. Newman*, 49 F.3d 1, 7 (1st Cir. 1995) (quoting *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977); *See* cases particularly referenced in 133

F.3d 92, *Burkhart v. Washington Metropolitan Area Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997). *Also see, Harbor Ins. Co. and Allstate Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. (Ill.) 1990); *Askanase v. Fatjo*, 130 F.3d 657 (5th Cir. (Tex.) 1997); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (4th Cir. (Md.) 1986); *Specht v. Jensen*, 853 F.2d 805 (10th Cir. (Colo.) 1988); *U.S. v. Zipkin*, 729 F.2d 384 (6th Cir. (Ohio) 1984); *Endress + Hauser, Inc. v. Hawk Measurement Systems Pty. Ltd.*, 122 F.3d 1040 (C.A. Fed. (Ind.) 1997); *Bergman v. United Services Automobile Association*, 742 A.2d 1101 (Pa. Super. 1999).

In its Memorandum Opinion, the panel fails to reference or distinguish the numerous cases from the eight other Circuits (App. 10a). *See* discussion at page 12 of this Petition.

The Third Circuit Panel decision affirming the trial court's failure to hold a pre-charge conference, failing to rule on submitted points for charge prior to summation; and failing to instruct the jury with respect to points for charge submitted by Syracuse's counsel on the basis that Syracuse's counsel failed to except or object at the end of the trial court's charge is clear error requiring reversal.

> Syracuse failed to bring any of these alleged errors to the attention of the District Court. As a result, our review is limited by the plain error standard. '[W]e will reverse only if the trial court committed plain error that was fundamentally and highly prejudicial. ...' *Alexander v. Riga*, ___ F.3d ___, 2000 WL 295288*4 (3d Cir. 2000).

(App. 13a)

In effect, the Third Circuit Panel held that supplying points for charge to a trial court and the court's refusal to give the points supplied by counsel requires in addition that trial counsel take an exception to the failure of the trial court to give the points for charge supplied to him.

Fed.R.Civ.P. 51 requires the court to inform counsel of its proposed actions upon the request for instructions prior to the arguments to the jury. The requirement of Fed.R.Civ.P. 51 that the court inform counsel is mandatory. Fed.R.Civ.P. 51 regarding objections to jury instructions must be read in conjunction with Fed.R.Civ.P. 46 which eliminates the necessity for formal exception:

Section 77:228 Formal exceptions abolished; necessity of objections

• • •

> a failure to object to jury instructions may be disregarded if the party's position has previously been made clear to the court and it is plain that further objection would be unavailing.

33 Fed. Proc., L.Ed §77:228 at p. 238.

Section 77:230 When objection is unnecessary.

> Normally, the purpose of FRCP 46 can be adequately served only by the making of an objection on the record, but if the court and other litigants know what action a party desires the court to take, the purpose of the rule is served. In such circumstances, a formal objection is not required, and the failure of the court to take the desired action may be asserted as error on appeal.

33 Fed. Proc., L.Ed. §77:230 at 239. *See* discussion at page 13 of this Petition.

The trial court admitted that before excluding a witness from testifying at trial, he *must* follow *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-905 (3d Cir. 1977), *overruled on other grounds, Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985). He admitted that he *did not follow* the mandates of the Third Circuit in *Meyers*. Nevertheless, a panel of the Third Circuit affirmed holding:

> On the facts of this case, we will not disturb the District Court's ruling.

(App. 9a)

The panel also erroneously states "No one of the *Meyers* factors is dispositive and we do not find that the Court's application of those factors supports Syracuse's argument that the sanctions imposed were based on a clear abuse of discretion." (App. 9a-10a) In effect, a panel of the Third Circuit has overruled *Meyers* in a Memorandum Opinion. *See*, discussion at pages 15-16 of this Petition.

The panel summarily dismissed in its Memorandum Opinion a matter of first impression dealing with the admissibility of an insurance carrier's cancellation/refusal to renew as a potential act of bad faith (App. 12a). The trial court refused to permit such evidence. Appellate courts in other states and another district court in Pennsylvania have permitted such evidence. The panel fails to reference or distinguish the numerous cases cited by Plaintiff. *See*, discussion at page 17 of this Petition.

A panel of the Third Circuit failed to consider that the complaint in the instant case sought ***both*** contractual ***and*** bad faith damages and/or sought recovery based upon contractual ***and*** bad faith legal principles. The trial court ignored Plaintiff's contractual claims, and a panel of the Third Circuit affirmed the error.

The panel's decision is contrary to *Nealy v. State Farm Mut. Auto. Ins.* Co., 695 A.2d 790, 792-793 (Pa. Super. 1997); *Doylestown Electrical Supply Co. v. Maryland Cas. Ins. Co.*, 942 F. Supp. 1018, 1019, 1020 (E.D. Pa. 1996); and *Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524, 529 (3d Cir. 1997) which have all held that a bad faith claim is separate and distinct from the *underlying contractual* claims from which the dispute arises.

Bringing a *combination* bad faith/contract action requires the consideration of *separate* legal principles, different burdens of proof, different charges to the jury, and *separate* consideration following post-trial motions (App. 6a).

Again, the panel fails to reference and/or distinguish the numerous cases cited by Plaintiff and discussed at page 17 of this Petition.

I. It Is Reversible Legal Error For A Trial Judge To Permit An Attorney Expert To Express Legal Opinions Over Opposing Counsel's Objections

---

When Defendant's legal expert was called, Plaintiff's counsel immediately objected:

> MR. ANGINO: Your Honor, I would like an offer of proof with regard to this.
>
> THE COURT: I think you know what he is going to testify to.
>
> MR. ANGINO: I am going to object to the legal aspect of it, Your Honor.

(App. 31a)

Defense counsel qualified his legal expert, Mr. Windt, as being the author of a two-volume set of insurance law, who gives lectures to lawyers as to insurance law.

> Q. Mr. Windt, I have seen your advertising brochure and this book has been hailed as the Bible of insurance law?
>
> MR. ANGINO: I object, Your Honor.
>
> ° ° °

Q. I want to ask you the question do you know why it is your book is so highly regarded?

A. It has gotten some good book reviews over the years.

Q. Your book has been cited by hundreds of Courts; is that right?

A. Around the country, yes.

(App. 36a)

Defendant's expert was presented to the jury as a lawyer who is consulted by insurance companies and by other lawyers and cited by courts because of his knowledge of the law of bad faith. This is error in eight Circuits and should be error in the Third Circuit.

II. A Party Does Not Waive His Right To Object By Failing To Except Or Object To The Trial Judge's Charge Under The Circumstances Where The Trial Judge Refused To Hold A Pre-Charge Conference, Failed To Rule On Submitted Points For Charge, And Failed To Instruct The Jury With Respect To Points For Charge Submitted By Counsel

---

This issue was addressed in Plaintiff's discussion in the first section of this Petition.

Last summer, the Pennsylvania Superior Court decided *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. 1999). The Superior Court addressed the issues of adequacy of jury instructions and the relevance of Pennsylvania's Unfair Insurance Practices Act (UIPA) and pertinent regulations in instructing jurors on "bad faith." *Also see, A & E Supply Co. v.*

Nationwide Mut. Fire Ins. Co., 612 F. Supp. 760 (W.D. Va. 1985).

Plaintiff's Points for Charge submitted to the Court have lines for the Court to acknowledge whether it affirms or denies the point for charge or, as often occurs, the Court states that the proposition will be covered in the Court's general charge.

In the thirty-five year experience of Plaintiff's counsel, trial judges usually have pre-charge conferences to review points for charge to determine which points for charge will be given, which ones will be denied, and which ones will be incorporated in the general charge. Sometimes the trial judges merely advise counsel of their rulings by noting their decision on the points submitted or by dictating their rulings on the record before the commencement of summations. *In either event, counsel need not specifically object or take exceptions to the Court's rulings.*

Plaintiff's counsel in the instant case asked for a pre-charge conference. The following colloquy took place:

> MR. ANGINO: Sure. What is the time we are going to start tomorrow, Your Honor?
>
> THE COURT: Nine.
>
> MR. ANGINO: Thank you. *Do you want to start with the jury charge conference tomorrow morning or closing arguments?*
>
> THE COURT: I *don't plan to hold a charge conference. I don't usually do that. The law is very clear here.*
>
> MR. ZELLE: That is fine. I would like to know when if I have any objection to the jury charge—I don't want to do it in front of the jury obviously.
>
> THE COURT: I think after I deliver my charge if you have any objections, you can come to sidebar, and we will put them on the record.

MR. ZELLE: That is fine. Thank you.

THE COURT: I will correct anything that I misquoted to the jury. *But I have charged jurors on this exact thing, and I think my charge is within the limits of the law.* (emphasis added)

(App. 76a)

The Trial Judge did not rule in advance on the parties' Points for Charge, did not advise the attorneys as to how he would charge, and did not make a record of his rulings prior to the giving of their summations.

After the summations, the Trial Judge proceeded to give his general charge which failed to include *virtually all of the specific points presented by the Plaintiff in the Plaintiff's Points for Charge, particularly the points dealing with the Unfair Insurance Practices Act, the regulations, and the various definitions of bad faith.*

Compare the Trial Judge's charge in the instant case with the charge given in *A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co., supra,* 612 F. Supp. at 777.

Defense counsel and the Trial Court contend that Plaintiff did not preserve its objections to the Trial Court's failure to give Plaintiff's Points for Charge because Plaintiff did not object or file exceptions *following* the Court's charge.

As pointed out at the outset, the panel of Your Court erred in affirming the District Court's actions in this case.

III. It Is Reversible Error For The Trial Court To Sanction Counsel By Precluding Expert Testimony Because Of The Belated Filing Of An Expert Report Under Circumstances Where The Circuit Required "Prejudice" And No "Prejudice" Was Shown

---

The Trial Court admitted in its Memorandum Opinion:

> Plaintiff *correctly points* out that *before* imposing the sanction of striking proposed testimony by a witness we *must* consider:
>
> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified,
>
> (2) the ability of that party to cure the prejudice,
>
> (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and
>
> (4) bad faith or willfulness in failing to comply with the court's order.
>
> *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-905 (3d Cir. 1977), *overruled on other grounds, Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir. 1985), *aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed. 2d 572 (1987); *see also Elf Atochem N. Am., Inc. v. United States*, 882 F. Supp. 1497, 1498 (E.D. Pa. 1995). *Although we did not require Defendant to establish that admitting the expert's proposed testimony would cause prejudice, nor whether such prejudice could be cured, we did determine that Plaintiff's behavior was in disregard of the rules of civil procedure and the case management plan for this case.* Furthermore, although Plaintiff characterized the expert as a "rebuttal expert," his report

contained an analysis of Defendant's handling of Plaintiff's insurance claim. There was no excuse for Plaintiff awaiting the report by Defendant's expert before presenting its own witness. *To allow the Plaintiff to introduce opinion evidence which could have (and should have) been produced initially would have affected the orderly prosecution of the case. Following the Plaintiff's disregard of the discovery deadline (through a request for production of documents), we conclude that the sanction imposed was a valid exercise of our authority under Fed.R.Civ.P. 37. Slip op. at 6.* (emphasis supplied)

The trial court and a panel of the Third Circuit Court nevertheless disregarded the four requirements of *Meyers*.

IV. It Is Reversible Error For A Trial Court To Preclude Reference To An Insurance Carrier's Cancellation/Refusal To Renew As A Possible Act Of "Bad Faith" In An Insurance "Bad Faith" Case

---

Pennsylvania prohibits "wrongful" cancellation or refusal to renew, *e.g.*, Pennsylvania Automobile Insurance Cancellation Law, 40 P. S. §1008, *et seq.*, and/or the Pennsylvania Unfair Insurance Practices Act (UIPA), 40 P.S. §1171.1, *et seq. See Ohio Cas. Ins. Co. v. Travelers Ins. Co.*, 667 F. Supp. 222 (W.D. Pa. 1987).

A "wrongful" cancellation or refusal to renew can constitute "bad faith." *Spindle v. Travelers Ins. Co.*, 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977) is the seminal case in this area. *Also see, Ballow v. PHICO Ins. Co.*, 875 P.2d 1354 (S.Ct. Colo. 1993); *Waldon v. Cotton States Mut. Ins. Co.*, 481 So.2d 340 (Ala. 1985); *Helfand v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 10 Cal. App. 4th 869, 13 Cal. Rptr.2d 295 (1992);

PepsiCo, Inc. v. Continental Cas. Co., 640 F. Supp. 656 (S.D.N.Y. 1986); *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 917 (Okla. 1982); *Parsaie v. United Olympic Life Ins. Co.*, 29 F.3d 219 (5th Cir. (Tex.) 1994); *A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co., supra, rev'd on other grounds*, 798 F.2d 669 (4th Cir. 1986).

In Pennsylvania, *see Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353 (E.D. Pa. 1997) where Judge Cahn held that the act of rescission can constitute bad faith.

V. It Is Reversible, Prejudicial Error To Grant Partial Summary Judgment And A Motion In Limine Removing From The Jury's Consideration Contractual Issues And Evidence Of Consequential Damages And/Or Lost Profit Based Upon Contract Issues When The Complaint Seeks Both Contractual And Bad Faith Damages And Where The State Law Provides For Different Burdens Of Proof With Respect To Contract And "Bad Faith" Issues

---

Where a plaintiff's business is to provide drilling services which often involve bidding for contracts and Plaintiff's CEO and General Manager have testified that they lost contracts and profits and provide documentary information pertaining to the loss of contracts and profits, the issue of lost contracts and profits should be an issue for the jury, *e.g.*, *Hindman Transfer & Storage Inc. v. PMA Group*, 31 D. & C. 4th 55 (C.P. Butler 1996). Not so said the district court and a panel of the Third Circuit.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,
ANGINO & ROVNER, P.C.
RICHARD C. ANGINO
I.D. No. 07140
Attorneys for Petitioners

PROOF OF SERVICE

I, Richard C. Angino, Esquire, hereby certify that I have this 24th day of August, 2000, served three true and correct copies of Petition for Writ of Certiorari to the Third Circuit Court of Appeals by sending same by United States first-class mail, postage prepaid, to the following.

Robert E. Kelly, Jr., Esquire
Duane Morris & Heckscher LLP
305 North Front Street
P.O. Box 1003
Harrisburg, PA 17108-1003
(717) 237-5533

Anthony R. Zelle, Esquire
Robinson & Cole
1 Boston Place
Boston, MA 02108
(617) 557-5900

I further certify that all parties required to be served have been served.

Richard C. Angino

RICHARD C. ANGINO, ESQUIRE
I.D. No. 07140
4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791
Counsel for Appellants

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3811

SYRACUSE EXPLORATION

vs.

NORTHBROOK PROPERTY

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,*

SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, FUENTES, *Circuit Judges,* and WARD, *District Judge.*°

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
/s/Carol Los Mansmann
Circuit Judge

° Judge Ward voted only as to panel rehearing.

UNREPORTED—NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3811

SYRACUSE EXPLORATION COMPANY,

Appellant

v.

NORTHBROOK PROPERTY & CASUALTY
INSURANCE COMPANY

Appeal from the United States District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 97-cv-01405)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
May 23, 2000

Before: SLOVITER and MANSMANN, *Circuit Judges*
and WARD, *District Judge*

(Filed: May 26, 2000)

MEMORANDUM OPINION OF THE COURT

---

* Honorable Robert J. Ward, of the United States District Court for the Southern District of New York, sitting by designation.

MANSMANN, *Circuit Judge.*

Syracuse Exploration Corporation, the plaintiff in a diversity action alleging bad faith on the part of its insurers under 42 Pa. Cons. Stat. Ann. §8371, appeals from an order of the District Court granting partial summary judgment in favor of the insurer, Northbrook Property & Casualty Insurance Corporation. Syracuse also appeals from an order of the District Court denying Syracuse's motion for a new trial. Syracuse raises multiple allegations of error with respect to the grant of partial summary judgment, contending that the District Court erred in: (1) concluding that Syracuse failed to produce evidence in support of its bad faith claim based on Northbrook's depreciation and lost profits calculations; and (2) striking the report of Syracuse's expert as untimely. Syracuse raises additional allegations of error with respect to the District Court's denial of its motion for a new trial. Specifically, Syracuse contends that the District Court erred in: (1) precluding the introduction of evidence relating to Northbrook's failure to renew the insurance policy held by Syracuse; (2) permitting Northbrook's expert to express a legal opinion; (3) ruling that Syracuse's owner could not be questioned regarding the financial status of the company; (4) failing to hold a pre-charge conference and to deliver certain instructions requested by Syracuse; (5) formulating inadequate responses to questions posed by the jury during the course of deliberation; and (6) tolerating alleged misconduct on the part of counsel for Northbrook. We are convinced that each of the allegations of error lacks merit and will affirm the orders of the District Court.

I.

The parties are well familiar with the facts underlying this appeal and have referred to those facts in detail in the course of setting forth their respective positions. As a result, we refer to the facts only to provide context for our conclusions of law.

In September 1997 Syracuse filed a diversity action in the Middle District of Pennsylvania, alleging that Northbrook acted in bad faith in violation of Pennsylvania law when it processed an insurance claim for fire damage to a drilling rig owned by Syracuse. Syracuse sought lost profits, compensatory and punitive damages, and attorney's fees.

In January 1998 Northbrook filed a motion for partial summary judgment with respect to that portion of Syracuse's claim based on the deduction of depreciation from the amount owed. This motion was denied, as was Northbrook's motion for reconsideration.

At the close of discovery in August 1998, Northbrook filed a second motion for partial summary judgment on the depreciation and lost profits elements of Syracuse's bad faith claim. Following oral argument, the Magistrate Judge concluded that Syracuse failed to meet its burden of "point[ing] to some evidence of an unreasonable calculation of depreciation and of lost profits." *Syracuse Exploration Corp. v. Northbrook Property & Casualty Ins. Co.*, Civ. No. 1:CV-97-14-5, report and recommendation at 5 (M.D. Pa. October 22, 1998). Accordingly, the Magistrate Judge recommended that Northbrook's motion for partial summary judgment be granted. In an order dated December 31, 1998, the District Court adopted the report and recommendation of the Magistrate Judge, granting partial summary judgment in favor of Northbrook. In the same order the District Court granted Northbrook's motion to strike a report prepared by Syracuse's expert witness, finding that the report was untimely.

In May 1999 Northbrook filed motions in limine seeking to exclude at trial evidence relating to Syracuse's alleged lost profits and financial status, Northbrook's failure to renew its insurance contract with Syracuse, and the method used by Northbrook to calculate depreciation. In an order dated June

3, 1999, these motions were granted. Trial began on June 7, 1999, and concluded on June 8th with a jury verdict in favor of Northbrook.

On June 11, 1999, Syracuse filed a motion for a new trial alleging that the District Court erred in admitting and excluding certain items of evidence at trial, instructing the jury, and tolerating prejudicial misconduct on the part of Northbrook's counsel. The motion was denied on September 28, 1999. A timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. §1291.

II.

We address first Syracuse's appeal from the District Court order granting partial summary judgment in favor of Northbrook. Syracuse challenges first those portions of the order directing that judgment be entered in favor of Northbrook on Syracuse's claim that Northbrook exhibited bad faith in calculating a depreciation deduction and on the claim for lost profits.[1]

A.

The deduction for depreciation and calculation of lost profits.

Pennsylvania law provides a statutory remedy for insurers' bad faith conduct. 42 Pa. Cons. Stat. Ann. §8371 reads:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, a court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the

---

[1] In a parallel argument, Syracuse contends that the District Court erred in granting Northbrook's motions in limine precluding the introduction at trial of evidence relating to the method by which depreciation and lost profits were calculated. Our finding that the District Court did not err in granting summary judgment with respect to these claims is dispositive of Syracuse's challenge to the District Court's grant of the motions in limine.

> date the claim was made by the insured, in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney's fees against the insurer.

Although the statute does not define the term "bad faith," we have found that: "in the insurance context the term ... has acquired a peculiar and universally acknowledged meaning." *Polselli v. Nationwide Mutual First Insurance Co.*, 23 F.3d 747, 751 (3d Cri. 1994). " 'Bad faith' " on [the] part of [an] insurer is any frivolous or unfounded refusal to pay proceeds of a policy .... [S]uch conduct imports a dishonest purpose and means a breach of a known duty ... through some motive of self-interest or ill-will; mere negligence or bad judgment is not bad faith." *Id.* Based on this definition, we concluded that reckless behavior may constitute bad faith and clarified that a plaintiff bears the burden of proving bad faith by clear and convincing evidence. *Id.* at 750, 751.

In granting Northbrook's motion for partial summary judgment, the District Court adopted the report and recommendation of the Magistrate Judge in which the Magistrate Judge found, on the two relevant elements of its bad faith claim, that Syracuse failed to meet its burden of proof:

> Syracuse, who has the burden of proof, must point to some evidence of an unreasonable calculation of depreciation and of lost profits to avoid an entry of summary judgment in favor of defendant Northbrook as to these portions of [Syracuse's] claim.

Report and Recommendation at 5. Addressing the calculation of depreciation, the District Court noted that Syracuse conced[ed] in its brief that Northbrook may have had a reasonable basis for its depreciation calculation." *Id.* at 6. The District

Court then stated:

> [A]fter the completion of discovery, Syracuse does not even present a single argument that the depreciation calculation of $4,288.16 as applied against a total claim of $51,718.67 was unreasonable. In the absence of a colorable argument of unreasonableness in the calculation, evidence concerning the method of calculation of depreciation would not be relevant and admissible at trial to support an inference of a combination of factors that added together comprise bad faith.

Id. at 7.

The District Court's conclusion with respect to that portion of the bad faith claim based on lost profits was similar:

> [Syracuse] again does not present any factual interpretation or theory supporting a claim of bad faith or unreasonableness in connection with the handling of the lost profits portion ... of the claim. ...

Id. at 9.

We have reviewed the record in this matter and are convinced that the grant of partial summary judgment on the depreciation and lost profits elements of the bad faith claim was appropriate. We agree with the District Court that where Syracuse failed to establish even an inference of bad faith in calculating depreciation or lost profits, evidence relating to those calculations was irrelevant to the overall claim of bad faith.[2]

---

[2] On appeal, Syracuse's sole argument regarding the grant of summary judgment as to the calculation of depreciation is one never advanced in the District Court. Syracuse contends that under Pennsylvania law depreciation may not be deducted where there has been a partial loss that does not exceed the depreciated value of the whole property. Assuming, arguendo, that this is a correct statement of the law applicable to the facts of this case, Syracuse still has failed to meet its burden of proof on the depreciation element of its claim. Syracuse was required to

B.

Sanctions imposed for untimely filing of expert's report.

Syracuse's remaining challenge to the grant of partial summary judgment in favor of Northbrook focuses on that portion of the order striking the report of Syracuse's expert as untimely and directing that Syracuse reimburse Northbrook for costs and attorney's fees associated with the motion to strike the report.

A District Court's ruling excluding evidence because of counsel's failure to adhere to a pretrial order will not be disturbed on appeal absent a clear abuse of discretion. *DeLaval Turbine, Inc. v. West India Indus. Inc.*, 502 F.2d 259 (3d Cir. 1974). In determining whether there has been an abuse of discretion, we consider four factors: "(1) the prejudice or surprise in fact to the party against whom the excluded witness would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or wilfulness in failing to comply with the court's order." *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-05 (3d Cir. 1977).

The record in this matter establishes that the District Court was aware of the *Meyers* factors and referenced them in its decision to exclude the testimony of Northbrook's expert:

---

show that Northbrook did not have a reasonable basis under the law for calculating depreciation and that Northbrook "knew or recklessly disregarded its lack of reasonable basis" in making that calculation. *Terletsky v. Prudential Property and Casualty Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680, 688 (1994). Syracuse does not point to anything in the record that would support even an inference that Northbrook lacked a reasonable basis for its calculation. In fact, as we have noted, Syracuse, in its brief filed in opposition to Northbrook's motion for summary judgment, clarified that Northbrook was not guilty of bad faith or reckless conduct for asserting that it had a legal right to subtract depreciation.

> Although we did not require [Northbrook] to establish that admitting the expert's proposed testimony would cause prejudice, nor whether such prejudice could be cured, we did determine that [Syracuse's] behavior was in disregard of the rule of civil procedure and the case management plan for this case. ... There was no excuse for Syracuse awaiting the report by Northbrook's expert before presenting its own witness. To allow [Syracuse] to introduce opinion evidence which could have (and should have) been produced initially would have affected the orderly prosecution of the case. Following [Syracuse's] disregard of the discovery deadline (through a request for production of documents) we conclude that the sanction imposed was a valid exercise of our authority under Fed. R. Civ. P. 37.

Syracuse Exploration Co. v. Northbrook Prop. & Cas. Ins., Co., No. 1:CV-97-1405, memorandum at 5-6, (M.D. Pa. Sept. 28, 1999). We do not find reason in the record to disagree with the District Court's finding that Syracuse was responsible for the position in which it found itself with regard to its expert's report: The report was filed nearly four months after the date established by the case management plan and "there was no excuse" for this late filing. It is also clear that this late filing was not Syracuse's first infraction of the case management plan and that consideration of the report at the time of its proffer would have had a significant impact on "orderly prosecution of the case." In these circumstances, the District Court did not require that Northbrook make a showing of prejudice. As the District Court explained, the other *Meyers* factors so heavily weighed in favor of striking the expert's report that the showing of prejudice "was not required." On the facts of this case, we will not disturb the District Court's ruling. No one of the *Meyers* factors is dispositive and we do not find that the Court's

application of those factors supports Syracuse's argument that the sanctions imposed were based on a clear abuse of discretion.

III.

We address next Syracuse's contention that the District Court erred in failing to grant its motion for a new trial. Our decision in *Bhaya v. Westinghouse Electric Corp.*, 922 F.2d 184 (3d Cir. 1990) establishes that when we review a District Court's decision to grant or deny a motion for a new trial, we must accord substantial deference to the decision of the District Court which "saw and heard the witnesses and has the feel of the case which no appellate transcript can impart." *Id.* at 187 (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). With this standard in mind, we turn to the grounds supporting Syracuse's motion for a new trial.

A.

Allegations of error related to evidential issues.

Three of the allegations of error made by Syracuse in connection with the District Court's denial of its motion for a new trial relate to the admission or exclusion of evidence. Our standard of review with respect to evidentiary issues is especially narrow. A finding that a new trial is required "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994) (quoting *Linkstrom v. Golden T. Farms*, 883 F.2d 269 (3d Cir. 1989)). Nonconstitutional evidentiary error in a civil suit warrants reversal only where it is highly probable that the error affected the outcome of the case. Glass, 34 F.3d at 91.

Syracuse alleges that it was entitled to a new trial based on the District Court's: (1) admission of the testimony of Northbrook's expert witness; and (2) exclusion of evidence relating to Northbrook's non-renewal of Syracuse's insurance

policy and testimony concerning Syracuse's financial status. We address these allegations of evidentiary error seriatim, considering first the testimony of Northbrook's expert witness. Syracuse contends that this expert, an attorney, was permitted to testify, over objection, "to legal issues which are reserved for the court." Northbrook's expert was called to testify in this bad faith action based on his familiarity with acceptable claims-handling standards and practices in the insurance industry. We have reviewed the transcript of the expert testimony challenged by Northbrook and are convinced that the District Court was careful to guard against allowing the expert to testify to matters reserved to the Court. We agree with the substance of Northbrook's characterization of the expert testimony:

> Noticeably absent from [the expert] testimony is any discussion of (or even reference to) the Pennsylvania bad faith statute, the legal standards governing the determination of liability under the statute, a definition of "bad faith," or any other matter exclusively within the province of the district court. Indeed, on the one occasion when questioning by Northbrook's counsel arguably invited an opinion regarding the law of bad faith, the district court sustained the objection of Syracuse's counsel and appropriately limited the scope of Northbrook's counsel's inquiry.

We do not find any abuse of discretion in the District Court's admission of this evidence.

Our conclusion is similar with respect to the other evidentiary rulings challenged by Syracuse in its motion for a new trial. Syracuse contends that the District Court erred in excluding evidence of Northbrook's failure to renew Syracuse's insurance policy and in precluding Syracuse's owner from testifying about the financial status of the company. We evaluate exclusion of these items of evidence in the context of what

was at issue. As the District Court observed, "The only question at trial was whether Syracuse proved by clear and convincing evidence that Northbrook's handling of Syracuse's claim was done in bad faith." Memorandum (September 28, 1999) at 2.

The District Court concluded first that the excluded evidence relating to non-renewal of the insurance policy was not relevant in determining whether Syracuse had operated in bad faith. The court also concluded that Syracuse's argument that the non-renewal was itself evidence of bad faith was "not supported by decisions interpreting the Pennsylvania bad faith statute." *Id.* at 4. We agree with both of these conclusions and, accordingly, find that the District Court's exclusion of evidence relating to non-renewal was consistent with the sound exercise of judicial discretion.

The District Court's decision to exclude evidence bearing on Syracuse's financial status was also consistent with the sound exercise of judicial discretion. We agree with the District Court's analysis of the evidence:

> [Syracuse] never offered to show that [Northbrook] knew of [Syracuse's] financial status. Because an insured's financial condition, standing alone, cannot establish bad faith on the part of the insurer, there was no error in excluding this evidence.

Id. at 7.

B.

The charge to and questions from the jury

Syracuse next argues that it is entitled to a new trial based on the District Court's: (1) decision not to hold a charge conference; (2) failure to rule on the parties' proposed jury instructions prior to closing argument; (3) failure to deliver certain instructions requested by Syracuse, particularly those relating to the Unfair Insurance Practices Act; and (4) formu-

lation of answers to questions posed by the jury during the course of deliberation.

Syracuse failed to bring any of these alleged errors to the attention of the District Court. As a result, our review is limited by the plain error standard. "[W]e will reverse only if the trial court committed plain error that was fundamental and highly prejudicial ...." *Alexander v. Riga*, ___ F.3d ___, 2000 WL 295288 *4 (3d Cir. 2000).

Applying this standard to the allegations of error raised by Syracuse, we do not find any ground upon which to reverse. A charging conference is not required by the governing rule, Fed. R. Civ. P. 51. Syracuse did not object to the District Court's failure to rule on the parties' request for jury instructions and does not explain here how it was prejudiced by this failure. This would, indeed, be a difficult argument to make given that Syracuse failed to object to the instructions given at any point prior to the jury's retiring to deliberate, despite having been invited by the court to do so.

Likewise, we do not find error, plain or otherwise, in the District Court's charge to the jury. We agree with Northbrook that the instructions given fairly and adequately identified the issues in the case. The District Court thoroughly explained its decision not to instruct the jury regarding the Unfair Insurance Practices Act (UIPA):

> The UIPA is concerned with improper conduct that occurs so frequently as to rise to the level of a "business practice." The bad faith statute, on the other hand, is concerned only with an insurer's actions in a specific case.... Instructing the jury on the UIPA might lead to confusion. We believe the better approach is to permit the instruction of evidence showing non-compliance with the UIPA, as Syracuse did here, but to allow the jury to decide whether this is evidence of bad faith as that term

is defined in the law.

Memorandum (September 28, 199) at 11.

We have reviewed, too, the District Court's answers to questions posed by the jury during the course of deliberation. The record establishes that the District Court discussed its proposed answers to these queries with counsel for both parties and that Syracuse did not register any objection. We find nothing in the District Court's communication with the jury to suggest that Syracuse suffered any prejudice at all, let alone the degree of prejudice necessary to support a finding of plain error.

We are convinced that the allegations of error in the District Court's admission and exclusion of evidence lack merit and do not warrant the grant of a new trial.

C.

Alleged misconduct on the part of counsel for Northbrook

Syracuse contends that the District Court erred in denying its motion for a new trial where counsel for Northbrook engaged in unprofessional conduct by instructing a witness not to bring an allegedly relevant file to court. We have reviewed the record as it relates to this claim and are convinced that the District Court's refusal to grant a new trial based on the alleged misconduct was consistent with the sound exercise of judicial discretion. The District Court's analysis of this issue was sound and we adopt it here:

> In its initial disclosures in December 1997, [Northbrook] informed [Syracuse] that [the witness] was involved in handling [Syracuse's] claim. [Northbrook] also indicated in its pretrial memorandum that [the witness] would testify at trial. Because [the witness] is not an employee of [Northbrook], his files were not in possession or control of [Northbrook] and they were not produced in response

> to a request for documents. However, [Syracuse] had ample opportunity to subpoena the ... files. The failure to do so cannot be blamed on [Northbrook] nor provide a basis for a new trial.... Furthermore, [Syracuse] has not shown that the failure to produce [the] ... files was prejudicial.

Memorandum (September 28, 1999) at 9 (citations omitted).

IV.

Because Syracuse's allegations of error with respect to the grant of Northbrook's motion for partial summary judgment and the denial of Syracuse's motion for a new trial lack merit, we will affirm the orders of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol L. Mansmann
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1405

SYRACUSE EXPLORATION COMPANY,

Plaintiff

vs.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant

MEMORANDUM

I. *Introduction*

Plaintiff, Syracuse Exploration Company ("Syracuse"), has filed a motion for new trial. This was a bad faith claim in which the jury exonerated Defendant's ("Northbrook") handling of Plaintiff's insurance claim. *See* 42 Pa. Cons. Stat. Ann. § 8371 (West 1998). Plaintiff alleges that the court made errors in ruling on motions in limine, admitting or excluding evidence at trial, and in instructing the jury. As discussed below, we conclude that these claims of error do not warrant the relief sought.

In addition, Defendant has filed a motion to strike certain post-trial affidavits submitted by the Plaintiff concerning several occurrences during the trial. We well deny that motion because those filings are authorized by Fed. R. Civ. P. 59.

II. *Background*

Syracuse was insured by Northbrook for damage to its construction equipment. On September 16, 1997, Syracuse commenced this action claiming that Northbrook acted in bad faith in handling a claim involving damage to a drill rig. Syracuse alleged that Northbrook unreasonably delayed paying its claim for damage to the rig; canceled the policy follow-

ing submission of the claim; took an improper deduction for depreciation; and that the handling of the claim caused Syracuse to sustain lost profits. The only question at trial was whether Syracuse proved by clear and convincing evidence that Northbrook's handling of Syracuse's claim was done in bad faith. The jury returned a verdict in favor of the Defendant on June 9, 1999.

III. *Standard of Review*

A motion for a new trial under Fed. R. Civ. P. 59 may be granted "if required to prevent injustice or to correct a verdict that was against the weight of the evidence." *American Bearing Co., Inc. v. Litton Indus.*, 729 F.2d 943, 948 (3d Cir. 1984); *Alexander v. Morning Pride Mfg., Inc.*, 913 F. Supp. 362, 372 (E.D. Pa. 1995). A new trial may be necessary where the verdict is so contrary to the weight of the evidence that it represents "a miscarriage of justice" or "cries out to be overturned or shocks our conscience." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991); *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 201 (3d Cir. 1996) "Injustice" requiring a new trial may include the improper exclusion of evidence, or a jury instruction that misstates the law, so long as the error "appears to the court inconsistent with substantial justice. Fed. R. Civ. P. 61; *Bailey v. Atlas Powder Co.*, 602 F.2d 585, 588 (3d Cir. 1979)

IV. *Discussion*

A. *Evidentiary Rulings Before Trial*

Prior to trial Defendant submitted several motions in limine, all of which were granted. Two of these motions stemmed from a partial summary judgment that was granted to the Defendant. The court determined that Plaintiff had failed to produce evidence, first, that the depreciation calculation used by Defendant was unreasonable or was reached in bad faith and, second, that Plaintiff had sustained lost profits

due to Defendant's handling of its claim. Accordingly, we granted Defendant's motion in limine to exclude evidence as to lost profits or the method it used to determine depreciation.

Plaintiff argues that the jury should have been permitted to consider evidence of lost profits and Defendant's handling of the depreciation item. However, because Plaintiff failed to produce evidence, in response to Defendant's summary judgment motion of any losses it sustained, or that Defendant's calculation of depreciation was done in bad faith, Plaintiff forfeited these claims. Inasmuch as these allegations could no longer serve as a basis for Plaintiff's bad faith claim, we find no error in excluding this evidence at trial.

In response to a third motion in limine by Defendant, we excluded evidence of Defendant's decision not to renew Plaintiff's insurance policy based on Plaintiff's loss history. Renewal of the policy was not relevant to the issue of the Defendant's handling of Plaintiff's claim. Plaintiff now argues that the nonrenewal was itself evidence of bad faith.

Plaintiff's argument is not supported by decisions interpreting the Pennsylvania bad faith statute. *See Perschau v. USF Ins. Co.*, 1999 WL 162969, at *4 n.6 (E.D. Pa. Mar. 22, 1999) (sending notice of non-renewal to insured not evidence of bad faith); *Belmont Holdings Corp. v. Unicare Life & Health Ins. Co.*, 1999 WL 124389, at *3 (E.D. Pa. Feb. 5, 1999) (holding that bad faith statute applies to handling of insurance claims and not to contract disputes, including threats not to renew policy); *Kurtz v. American Motorists Ins. Co.*, 1997 WL 117008, at *2-3 (E.D. Pa. Mar. 12, 1997) (reviewing case law and holding that bad faith statute does not apply to non-renewal of automobile policy); *see also U.S. Metal & Coin Jewelry, Inc. v. Jewelers Mut. Ins. Co.*, 1996 WL 494149 (E.D. Pa. Aug. 26, 1996) (allowing claim of bad faith based on the non-renewal of a policy, but finding none where decision was

legitimately based on insured's loss history). The cases cited by Plaintiff are not persuasive because they do not relate to the Pennsylvania bad faith statute or to non-renewal of insurance based on loss history. Accordingly, we conclude there was no error, and certainly no prejudice, in excluding this evidence.

A final pre-trial ruling challenged by the Plaintiff is our order of December 31, 1998, sanctioning Plaintiff for submitting an expert report three and one-half months after the deadline for submitting such reports. We ordered that the expert's report be stricken from the record. Plaintiff correctly points out that before imposing the sanction of striking proposed testimony by a witness we must consider:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified,
>
> (2) the ability of that party to cure the prejudice,
>
> (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and
>
> (4) bad faith or willfulness in failing to comply with the court's order.

Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894, 904-05 (3d Cir. 1977), *overruled on other grounds, Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir. 1985), *aff'd*, 482 U. S. 656, 107 S.Ct. 2617, 96 L. Ed. 2d 572 (1987); *see also Elf Atochem N. Am., Inc. v. United States*, 882 F. Supp. 1497, 1498 (E.D. Pa. 1995). Although we did not require Defendant to establish that admitting the expert's proposed testimony would cause prejudice, nor whether such prejudice could be cured, we did determine that Plaintiff's behavior was in disregard of the rules of civil procedure and the case management plan for this case. Furthermore, although Plaintiff characterized the expert as a "rebuttal expert," his report contained an analysis

of Defendant's handling of Plaintiff's insurance claim. There was no excuse for Plaintiff awaiting the report by Defendant's expert before presenting its own witness. To allow the Plaintiff to introduce opinion evidence which could have (and should have) been produced initially would have affected the orderly prosecution of the case. Following the Plaintiff's disregard of the discovery deadline (through a request for production of documents), we conclude that the sanction imposed was a valid exercise of our authority under Fed. R. Civ. P. 37.

B. *Evidentiary Rulings During Trial*

When the president of Syracuse began to testify about the company's debts we sustained Defendant's objection that this testimony was not relevant to the bad faith issue. In arguing that this testimony was admissible to establish bad faith, Plaintiff cites two cases where the insurer's knowledge of its insured's difficult financial condition may have been a factor in proving bad faith. *See Polselli v. Nationwide Mut. Fire Ins. Co.*, 1995 WL 430571 (E.D. Pa. July 20, 1995) (holding that insurer acted in bad faith in delaying payment of living expenses when insurer knew that insured had no place to live after fire destroyed home); *South Park Aggregates v. Northwestern Nat'l Ins. Co. of Milwaukee*, 847 P.2d 218, 225 (Colo. App. 1992) (holding that insurer's awareness of financial consequences to insured in denying claim was evidence of bad faith). However, Plaintiff never offered to show that Defendant knew of the Plaintiff's financial status. Because an insured's financial condition, standing alone cannot establish bad faith on the part of the insurer, there was no error in excluding this evidence.

Plaintiff contends that admitting testimony by the Defendant's expert, a lawyer who handles insurance claims, was error because the testimony included an opinion concerning the question for the jury, i.e., whether Defendant acted in bad faith. We find no error. First, Federal Rule of Evidence 704 permits testimony as to the ultimate issue. Second, the expert

testified primarily about the facts of the case and whether particular actions were acceptable practice within the insurance industry. Defendant's expert did not testify regarding decisions or interpretations of the law as did the attorney expert in *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92 (1st Cir. 1997), on which the Plaintiff relies. On those few occasions where the expert's testimony appeared to veer in the direction of offering a legal opinion, the court sustained Plaintiff's objections. For example, the expert was not permitted to testify as to the difference between bad faith and a mistake. (Tr. at 412.) Accordingly, we believe the expert's testimony was properly admitted.

During trial, Defendant called as a witness an independent appraiser, Charles Stanford, who adjusted the claim on its behalf. Stanford testified from memory about his handling of the Plaintiff's claim, and on cross-examination Plaintiff's counsel asked to see Stanford's files. Stanford stated that he did not have them because counsel for the Defendant told him it was not necessary to bring them to court. (*See* Stanford Aff. ¶5; Zelle Aff. ¶8.)[1] Plaintiff contends that defense counsel violated Rule 3.4 of the Rules of Professional Conduct[2] and that this behavior is grounds for granting a new trial.

This argument lacks merit. In its initial disclosures in December 1997, the Defendant informed Plaintiff that Stan-

---

[1] The court allowed Defendant additional time to submit affidavits in response to Plaintiff's arguments concerning Stanford's testimony. Plaintiff argues that we lacked the authority to grant an extension. Contrary to Plaintiff's position, the court did have discretion under Fed. R. Civ. P. 6(b) to extend Defendant's time for filing affidavits under Fed. R. Civ. P. 59(c). Although Rule 6(b) lists specific rules for which the time periods may not be extended, Rule 59(c) does not appear in this list.

[2] Rule 3.4(a) provides that "[a] lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act.

Pennsylvania Rules of Professional Conduct Rule 3.4(a).

ford was involved in handling the Plaintiff's claim. (Zelle Aff. ¶3.) Defendant also indicated in its pre-trial memorandum that Stanford would testify at trial. Because Stanford is not an employee of the Defendant, his files were not in the possession or control of Defendant and they were not produced in response to a request for documents. See Fed. R. Civ. P. 34. However, Plaintiff had ample opportunity to subpoena Stanford's files. The failure to do so cannot be blamed on the Defendant nor provide a basis for a new trial. *See Buchholz v. Rockwell Int'l Corp.*, 120 F.3d 146 (8th Cir. 1997) (denying motion for new trial for failure to produce documents where opposing party was aware of their existence one year before trial). Furthermore, Plaintiff has not shown that the failure to produce Stanford's files was prejudicial.

C. *Jury Charge*

Plaintiff maintains that a new trial should be granted because the court did not hold a charge conference and because certain instructions he proposed were not given to the jury. A jury charge conference is not required by the federal rules of civil procedure. *See* Fed. R. Civ. P. 51. Furthermore, a new trial will not be granted due to an incorrect jury instruction, "unless the moving party brought the erroneous instruction to the court's attention at trial." *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 899 F.Supp. 1385, 1398 (E.D. Pa. 1995), *aff'd*, 91 F.3d 13 (3d Cir. 1996) (citing Fed. R. Civ. P. 51). This can be accomplished either by seeking a ruling on the proposed instruction or by objecting after the jury is charged. *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275-77 (3d Cir. 1998) In either case, the party must clearly state what portion of the charge is objected to and why it is objectionable. *Id* at 277; Fed. R. Civ. P. 51. Despite being provided with an opportunity to object, Plaintiff did not do so, and thus failed to preserve this issue as a basis for obtaining a new trial.

Although we need not consider Plaintiff's arguments regarding the jury instructions, we will nonetheless explain our decision not to include Plaintiff's proposed charges concerning the Unfair Insurance Practices Act ("UIPA"). *See* Pa. Stat. Ann. tit. 40, §§1171.1-.15 (West 1997 & Supp. 1999). Plaintiff's proposed Points for Charge Numbers 5 and 6 listed specific provisions of the UIPA and the companion regulations. Plaintiff's suggested charge would allow a jury to conclude that committing any act prohibited by the UIPA establishes bad faith on the part of the insurer. We do recognize that establishing that an insurer committed acts mentioned in the UIPA may provide support for a bad faith claim. *See Romano v. Nationwide Ins. Co.*, 435 Pa. Super. 545, 554, 646 A.2d 1228, 1233 (1994). Indeed, Plaintiff did introduce evidence that Defendant may not have complied with certain regulations, for example, in the timeliness of its response to Plaintiff's initial claim. We believe, however, that instructing a jury on these regulations is inappropriate. The UIPA is concerned with improper conduct that occurs so frequently as to rise to the level of a "business practice." Pa. Stat. Ann. tit. 40, §1171.5. The bad faith statute, on the other hand, is concerned only with an insurer's actions in a specific case. *See Hyde Athletic Indus. v. Continental Cas. Co.*, 969 F. Supp. 289, 307 (E.D. Pa. 1997) (observing that "[w]hat constitutes a reasonable set of business practices for the investigation and evaluation of claims is a question properly left to the Pennsylvania Insurance Commissioner, not a judge or a jury"). Instructing the jury on the UIPA might lead to confusion. We believe the better approach is to permit the introduction of evidence showing non-compliance with the UIPA, as the Plaintiff did here, but to allow the jury to decide whether this is evidence of bad faith as that term is defined in the law.

Plaintiff's remaining two grounds center on questions asked by the jury during the course of deliberations. We

responded to those questions as we thought appropriate. The Plaintiff did not note any objections to the statements made to the jury and thus failed to preserve these matters for review.

We will issue an appropriate order denying Plaintiff's motion for a new trial.

/s/William W. Caldwell
United States District Judge

Date: September 28, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1405

SYRACUSE EXPLORATION COMPANY,

Plaintiff

vs.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant

ORDER

AND NOW, this 28th day of September, 1999, upon consideration of Plaintiff's motion for a new trial, filed June 11, 1999 (Doc. No. 113), and Defendant's motion to strike post-trial affidavits, filed June 22, 1999 (Doc. No. 117), it is ordered that the motions are denied.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1405

SYRACUSE EXPLORATION COMPANY,

Plaintiff

vs.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant

ORDER

AND NOW, this 3rd day of June, 1999, upon consideration of four motions in limine filed by defendant, and plaintiff's responses thereto, it is ordered as follows:

1) Defendant's motion to exclude evidence relating to defendant's non-renewal of plaintiff's insurance policy is granted.

2) Defendant's motion to exclude evidence relating to defendant's *method of calculating* a depreciation deduction is granted. A ruling on whether plaintiff may refer in its case to the fact that a depreciation deduction was taken by defendant is deferred to trial.

3) Defendant's motion to exclude evidence relating to defendant's handling of lost profits is granted.

4) Defendant's motion in limine to exclude evidence as to defendant's financial status is granted. In the event of an award of punitive damages, such evidence will then be admissible.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1405

SYRACUSE EXPLORATION COMPANY,

Plaintiff

vs.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending at his point are objections filed by plaintiff to a report and recommendation authored by the Magistrate Judge J. Andrew Smyser, and filed on October 22, 1998. Also pending is defendant's motion to strike and for sanctions, filed November 9, 1998.

The Magistrate Judge's report recommends that we grant defendant's motion for partial summary judgment on plaintiff's bad faith claims, as follows:

1) that defendant was guilty of bad faith in handling the depreciation aspect of plaintiff's drilling insurance claims, and

2) that defendant was guilty of bad faith in handling the lost profit element of plaintiff's insurance claim.

We have carefully reviewed the report and recommendation of Judge Smyser, the plaintiff's objections thereto, and the respective briefs of the litigants. We adopt the report of Judge Smyser as our own memorandum, as it succinctly and clearly analyzes the merit of plaintiff's bad faith claims. As noted by Judge Smyser, the plaintiff failed to submit evidence to sup-

port its bad faith claim and avoid partial summary judgment. We will adopt the report, dismiss plaintiff's objections, and grant partial summary judgment to the defendant.

The defendant's motion to strike will also be granted and an appropriate sanction will be levied.

The motion to strike involves an expert report filed by plaintiff over three and one-half months after the deadline for filing expert reports. Plaintiff argues that this report is from a "rebuttal" expert, and was necessitated by defendant's motion for partial summary judgment. We consider this a somewhat disingenuous argument since the expert report is one which should have been prepared and produced initially in support of plaintiff's theory of defendant's liability for bad faith.

It is ordered as follows:

1) The report and recommendation of Magistrate Judge Smyser, filed October 22, 1998, is adopted.

2) The Clerk of Court is directed to enter a judgment in favor of defendant on plaintiff's claim of defendant's bad faith in handling a depreciation deduction and a lost profit claim in connection with plaintiff's insurance claim.

3) The report of Emil F. Toften and Associates, dated October 16, 1998, is stricken from the record.

4) Plaintiff shall pay defendant the reasonable cost incurred by defendant in moving to strike the Toften report.

5) This case is placed on the June, 1999, trial term, scheduling order to follow.

/s/William W. Caldwell
United States District Judge

Date: December 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1405

SYRACUSE EXPLORATION COMPANY,

Plaintiff

vs.

NORTHBROOK PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant

ORDER

AND NOW, this 29th day of April, 1998, upon consideration of the Report of the United States Magistrate Judge, dated April 8, 1998, to which no exceptions have been filed, and upon independent review of the record and the controlling law, it is ordered that the Magistrate Judge's Report is adopted. It is further ordered, pursuant to the Magistrate Judge's recommendation, that:

1. Defendant's motion for partial summary judgment, filed January 30, 1998 (Doc. No. 14), is *denied.*

2. Defendant's motion for the return of funds, filed January 30 (Doc. No. 13), is *denied.*

3. This matter is remanded to the Magistrate Judge for further proceedings.

/s/William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

97-CV-1405

SYRACUSE EXPORATION COMPANY,

Plaintiff

v.

NORTHBROOK PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant

TRANSCRIPT OF PROCEEDINGS

VOLUME 2

BEFORE: HON. WILLIAM W. CALDWELL, Judge

DATES: June 8 and 9, 1999

PLACE: Courtroom Number Three
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

RICHARD C. ANGINO, Esquire
For—Plaintiff

ANTHONY ROBERT ZELLE, Esquire
For—Defendant

Vicki L. Fox, RMR
Official Reporter

Mr. Allan Windt.

MR. ANGINO: Your Honor, I would like an offer of proof with regard to this.

THE COURT: I think you know what he is going to testify to.

MR. ANGINO: I am going to object to the legal aspect of it, Your Honor.

MR. WINDT: Good afternoon, Your Honor.

ALLAN WINDT, called as a witness, being duly sworn, testified as follows:

THE CLERK: Would you state for the record your full name, please?

A Allan Windt.

THE CLERK: Thank you very much.

DIRECT EXAMINATION AS TO QUALIFICATIONS

BY MR. ZELLE:

Q Mr. Windt, where do you live?

A The western suburbs of Philadelphia.

Q Will you tell the jury what you do for a living?

A I handle insurance claims for a living, primarily for insurance companies, also for some insureds.

Q Try to keep your voice up. How many insurance companies have you worked for over the past ten years?

A Probably more than 70.

Q How long have you been doing what you are doing?

A About 23 years.

Q In your work for insurance companies, describe for the jury what it is you do.

A Well, if a claim is particularly complicated, kind of out of the ordinary, an insured or an insurance company might come to me to help them figure out what to do, what is the correct result, is money owed, how should a claim be handled. It is really the best way I can summarize it.

Q Do you limit your practice to Philadelphia or—I am sorry—to the Pennsylvania area?

A No.

Q In what area do you provide services?

A I have done this in really every state. I can't remember. Maybe North Dakota, I don't remember. But I have done Hawaii, Alaska, pretty much everywhere.

Q If there is—

A Outside of the country, too.

Q If there is a dispute in Alaska about insurance, why would someone come to you in the outskirts of Philadelphia?

A It is an unusual expertise. There really aren't that many people that do what I do, that just limit their work to the type of thing that I do.

Q How did you develop this expertise?

A One learns by doing. I think it is the best way. It took a lot of work, also. I mean I devote a lot of time to developing the expertise pretty much on a weekly basis for the last 23 years.

I mean in addition to my work, I spend at least on average a portion of every week just continuing to develop my expertise.

Q What do you do on a weekly basis to continue to develop your expertise?

A Well, I read every insurance case that is reported that comes out nationwide in all 50 states.

Q When you say reported case, can you tell the jury what you mean?

A After this case is over, whoever loses will likely file an appeal. It doesn't always happen, but more likely than not, to a Court of Appeals. The Court of Appeals will issue a decision.

In fact, this Court might issue a decision that is significant enough that it gets reported in a way that people like me can read it and find out how policies have been interpreted, how duties have been interpreted. So that the next claim I handle, I have increased my expertise because I know more about what the industry does, what Courts find acceptable, how Courts or other people have interpreted policy provisions.

It is actually a lot more complicated than it sounds. Also probably a lot more boring than it sounds. But that is basically what I do.

Q Can you tell this jury examples of some cases they may have heard of that you have been involved with?

A Well, when Paula Jones sued Bill Clinton and Bill Clinton made a claim under his insurance policy for benefits, he had a home owner's policy when he lived Arkansas, that's where the alleged wrongdoing took place, because it was kind of an offbeat case and high visibility, the insurance company came to me and said what should we do, how should we handle this claim. So that is an example of a case that I am sure people will be familiar with.

Q Can you give another example?

A The movie and the book "A Civil Action," which some of you may be familiar with, years ago when the litigation was ongoing and the defendants went to their insurance company for coverage, the insurance company came to me and said this is a pretty complex, fairly big dollar case. What benefits do we owe? How should we handle this claim? What should we do? I would handle that claim—or did handle that claim.

Q Do you ever work for insurance companies in putting together and writing the insurance policy?

A Yes, occasionally.

Q Do you do any lecturing or present any educational

seminars for people who are trying to learn about handling insurance claims?

A Yes.

Q How often do you do that?

A On average, twice a year. Maybe a little more.

Q Who do you do that for typically?

A Sometimes it will be to groups of lawyers. Like one time, I went to Texas and traveled teach at the major cities to lecture to the lawyers in Texas that specialize in insurance, lawyers that might be trying a case like this.

Another example would be insurance companies may be having meetings where they may be having representatives come in from all 50 states, representatives of branch offices. And they would ask me to come and lecture and speak to this gathering about how they should handle claims, what they should and shouldn't do, that sort of thing.

Q Has the product of your work ever been published, Mr. Windt?

A Yes.

Q Am I holding up the two volume set of your work?

A Yes.

Q Can you tell the jury what this is?

A It is my life's work. What can I say?

Q Can you describe what the books are about?

A They were about handling insurance claims, good

Windt—Direct as to Qualifications 400

faith/bad faith, how to handle claims, what policies certain policy provisions mean. Just to provide help to lawyers, Courts. Not so much insureds because it is really not written for someone who doesn't have an existing knowledge in the area.

Q Mr. Windt, I have seen your advertising brochure and this book has been hailed as the Bible of insurance law?

MR. ANGINO: I object, Your Honor.

THE COURT: That is a little testimony there, isn't it?

MR. ANGINO: That doesn't sound like a question to me.

BY MR. ZELLE:

Q I want to ask you the question do you know why it is your book is so highly regarded?

A It has gotten some good book reviews over the years.

Q Your book has been cited by hundreds of Courts; is that right?

A Around the country, yes.

Q What does cited mean?

A Well, as I was saying before, sometimes a Judge or a Court of Appeals may issue—write an opinion saying here is who we think should win this case, here is what we think the policy means, and here is why. And they say in support of their conclusion we are reaching, see Windt on insurance,

page 423, which then they may quote me or whatever discusses the issue.

Q Do you receive a lot of calls from people asking you to work for them in cases as an expert witness?

A Yes.

Q How often?

A Well, I mean it can be a week goes by when I don't get any calls and a week where I get eight calls. I would say on average in the last couple of years, three times a week, something like that.

Q Just doing the multiplication, that is 150 times a year. Of those 150 calls, how many cases would you actually take? How many clients would you actually accept?

A Again, this is just the expert work, which again is kind of like a sideline for me. I take in an average year maybe ten, one in ten, one in fifteen, something like that.

Q You have been retained by Northbrook in this case; is that right?

A Yes.

Q And Northbrook is paying you; is that right?

A Yes.

Q How much are you charging Northbrook?

A I charge $300.00 an hour for my time.

Q Focusing in now on this case, what did you do in preparation for testifying here today?

A I read the file. I read some of the papers that were filed by the Court, by you and Mr. Angino. Am I saying it right, Angino?

MR. ANGINO: Your Honor, am I going to be permitted to ask some questions before he gets to the substance?

MR. ZELLE: I am not finished laying the foundation.

THE COURT: The qualifications?

A And some depositions, transcripts.

THE COURT: Just a second.

A I am sorry, Your Honor.

MR. ZELLE: Your Honor, let me—

THE COURT: It sounded like you had finished.

MR. ZELLE: You are right.

BY MR. ZELLE:

Q In connection with bad faith claims, can you describe for the jury the expertise you have in that area?

A Well, I am involved—I have been in involved in hundreds of bad faith claims over the years. Frequently what will happen in my practice is that an insurance company might send me a file after they have handled it themselves for a while and they think maybe they have done it wrong and maybe they have a bad faith problem, they send me a file. And I will analyze it and tell them whether they are guilty of bad

faith or not. That is one way I get involved.

Another way I get involved is lots of law firms around the country will call me with what they think are good bad faith claims. And I will give them my analysis of it.

If they really have a good bad faith claim as a plaintiff, sometimes I am willing to testify as an expert against the insurance company.

Q Are you familiar with insurance industry standards for handling insurance, specifically property insurance claims, and particularly the timeliness with which those types of claims should be handled?

A Yes. That is what I do for a living. The expert work is maybe ten percent of my time. What I do for a living is I handle claims.

Q And you are familiar with the industry standards for handling claims for adjusting damage to physical property; are you not?

A Yes.

Q And you are familiar more generally with claims handling practices and their compliance with the rules of good faith; is that right?

A Yes.

Q And you, in fact, are often retained by insurance companies to insure that they comply with regulations applying to good faith; isn't that right?

A I wouldn't phrase it quite that way.

Q How would you phrase it?

A Sometimes insurance companies will ask me to handle a claim for them. I mean I don't think the motivation is so they don't act in bad faith, just to help handle the claims appropriately.

Q And that is based on your familiarity with good faith claim handling practices?

A I guess yes. I wouldn't word it that way, but I suppose it is not inaccurate to put it that way.

MR. ZELLE: Your Honor, we would submit that Mr. Windt is qualified to testify as an expert.

THE COURT: Do you wish to cross-examine?

MR. ANGINO: Yes, I would like a few questions.

CROSS EXAMINATION AS TO QUALIFICATIONS

BY MR. ANGINO:

Q Part of the qualification questions dealt with what you do in terms of lecturing, and I think you testified that you tell lawyers and you tell insurance companies what the state of the law is with regard to good faith/bad faith; is that something that you discuss?

A It is just a tiny part of what I do. It is not really what I do. I mean I handle claims is what I do. In other words, the claim comes in, and I handle it. I draft the letters to the insured if I am working for the insurance company.

If I am working for the insured, I draft the letters to the insurance company. I do the analysis. I make the calls, the factual investigation as appropriate. I hire people to do the factual investigation as appropriate. That is what I do.

Q Maybe I misunderstood. I thought that the reason that you are called to be a witness or to give advice in all of the states of the union except perhaps for North Dakota is because of your expertise in this area?

A Wait a second. With regard to expert witness work, the question is question why would people call me as an expert witness, and I said suppose it is cause because of the notoriety of the book. People know who I am.

With regard to the 90 percent of my practice, which is what I do for a living handle claims, why do they come to me? Because I have a good track record of appropriately handling claims. That is what I do.

Q You are a lawyer; right?

A Yes.

Q And I am a lawyer. Mr. Zelle is a lawyer. His Honor is a lawyer. Is that right?

A Yes.

Q And you are familiar that in a courtroom, there is a lawyer representing a plaintiff, there is a lawyer representing

a defendant, and then there is a Judge who gives instructions to the jury; you understand?

A Yes.

Q In terms of appearing as an expert, is your background such that people hire you so that you can tell this jury that what was done here was good faith or bad faith; is that the reason you are hired?

A I am hired to give my opinion from analyzing a case. I don't take a lot of them because a lot of times, I disagree. But if I agree, I will get in the stand and tell what my opinion is.

Q So basically, you are here to tell this jury that what Northbrook did was okay; is that right?

A I am certainly prepared to say that, yes.

Q That is what I am saying.

A I wouldn't say okay. No, they didn't handle it perfectly. You and I spoke at length, what, six months ago, and I told you certain mistakes were made. No question about that.

Q You are going to say they handled it in good faith; is that right?

A Yes.

Q That is what you have been hired to do?

A That is clearly the bottom line that I am going to try to convey and explain how I reached that conclusion, yes.

Q And in those approximately ten or twelve cases you have given hourly, what do you usually make on an average on one of those ten or twelve cases that you take a year?

A As an expert witness?

Q Yes. From beginning to end.

A I couldn't give you an average. I could say in some cases where I do a report and it doesn't get as far as a deposition or trial, my bill may be less than a thousand dollars.

Q I am talking about a case that goes to trial, and you appear before a jury, and you testify. Would an average bill there be $5,000.00 or $10,000.00?

A If there has been no deposition, it should normally would be less than $5,000.00 total. Part of it is the travel time. I went to Alaska once on a case. The travel time which I billed for was like 20 hours each way. Do the math. It was a very significant bill.

Q You might have had a $20,000.00 bill in that case?

A Right. I had a case in Texas fifteen years ago, I think my bill even in dollars from fifteen years ago was like $70,000.00.

Q $70,000.00?

A I think so. My recollection—maybe it's $50,000.00. But I remember it being at the time like a real lot of money.

Q So insurance companies are willing to pay $50,000.00

to $70,000.00 to have you come into a courtroom?

A Or insureds.

MR. ANGINO: No further questions.

BY THE COURT:

Q Mr. Windt, from hearing your testimony, are you an independent insurance adjuster or do you work for somebody?

A No. I just have just me and a secretary, Your Honor.

Q You are an independent adjuster? You will adjust claims?

A Yes. It depends on what you define as an adjuster, but I mean I work on my own. I handle claims for a living. It's just me and a secretary.

Q Are you engaged in the practice of law as such?

A I would say yes in the sense that the reports that I will issue to my client will be subject to the attorney/client privilege.

Q Okay. But you are mainly concerned with the proper handling of insurance claims?

A I am not concerned with the properly handling. I just handle claims. That is what I do.

Q You are here to comment on whether Northbrook handled this claim—

A Here as an expert.

Q —in an acceptable annual proper manner?

A Yes, Your Honor. As an expert is different than from I

do really for a living.

MR. ANGINO: Can I ask one more question, Your Honor?

BY MR. ANGINO:

Q You mentioned Clinton and the Paula Jones matter. Now that was a case where Clinton, from what we have read in the paper anyway, did certain things with regard to Paula Jones at least as the complaint went.

Did you recommend to the insurance company that they provide coverage to President Clinton?

A No. I think that would be privileged what advice I gave them.

Q It turned out that they paid Paula Jones, the insurance company paid Paula Jones; is that correct?

A There were two insurance companies involved.

Q And did an insurance company pay Paula Jones?

A I don't believe the insurance company I worked for paid Paula Jones.

Q Did an insurance company pay Paula Jones?

A I don't recall that an insurance company paid Paula Jones.

THE COURT: I don't think that is relevant information.

THE COURT: We will accept Mr. Windt and let him testify subject to, of course, Mr. Angino's objection.

Zelle—Direct 410

MR. ZELLE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. ZELLE:

Q Can you please tell the jury what you have done in connection, what you have looked at, what you have heard in connection with forming the opinions that you have reached in this case?

A Well, I read the insurance company's file. I read I believe all of the depositions that were taken. That is sworn testimony that is taken by the lawyers of people that have some knowledge about the case. And that is done long before the trial starts.

And then I read some of the pleadings that were filed, documents filed with the Court, that Mr. Angino filed with the Court and that counsel for Northbrook filed with the Court.

And other than that, I was here this morning. I listened to the testimony of the people that testified today.

Q You in response to a question by Mr. Angino said that this wasn't a perfect claim handling. Can you tell the jury what mistakes were made here?

A You know, it would be easier if I could divide my analysis of this case into time frames—various time frames, and I will tell you within each time frame what was done right and what

was done wrong.

Q Sure. Would it help you to use the board?

THE COURT: Let's try it without.

BY MR. ZELLE:

Q Let's just use some dates then. Using the first time period, what are you using?

A The first relevant time period would be December 17th through January 2nd.

Q And what is the facts as you determined them during that time period?

A December 17th, you have the insured through its agent providing notice to the New York branch, the New York office of Northbrook. And then January 2nd, Northbrook finally finds out that the equipment is in Pennsylvania, and therefore the file should be handled in Pennsylvania. So that is to me the first relevant time period.

And despite the fact that Christmas is there, New Year's, I think that is longer than it should have been. And in all—I know the position of Northbrook is, well, the insured didn't tell us where the equipment was, but I think the insurance company should have called if you don't know where the equipment is.

I know it is Christmas, and I know it is New Year's, but nothing was done between December 17th and January 2nd, and I would say that is an error. That is a mistake.

I think they should have even within the holiday period done something.

Q Do you understand, Mr. Windt, the difference between a mistake or why don't you explain to the jury the difference between a mistake and bad faith?

A Right. Clearly in my opinion—

MR. ANGINO: Your Honor, I object because—

THE COURT: I sustain the objection.

MR. ANGINO:—that is an instruction.

BY MR. ZELLE:

Q Why don't you answer the question?

THE COURT: I sustained the objection. I don't think that Mr. Windt is going to be allowed to testify to the difference between a mistake and bad faith. That is something that I will charge the jury on.

But he has indicated that he thought a mistake was made with not jumping on this claim sooner in the first time period.

BY MR. ZELLE:

Q In making that distinction following the Judge's instruction, can you tell us whether the initial time frame of December 17th to January 2nd, is there anything that you looked at that led you to believe that there was any reckless disregard on the part of the—

A It is just a simple mistake. It happens.

MR. ANGINO: I object and continue to object to his testifying as to things that you are going to give instructions on because he is usurping the position of the Judge in this.

THE COURT: I think that is right. Gentlemen, come to sidebar for just a moment, please.

(An off-the-record discussion was had at sidebar.)

BY MR. ZELLE:

Q What was the next time frame after the 2nd of January?

A January 2nd to January 7th would be the next logical time frame to look at.

Q Describe what happened for the jury during that time frame.

A On January 2nd, Northbrook learns that the equipment is in Pennsylvania. So they send the file to the correct office. And the file is opened in the correct office on January 7th. There is an intervening weekend. It seems fine to me.

Q Do you have an opinion, sir, as to whether there was any delay during that time period?

A It seems fine to me.

Q What was the next time period?

A January 7th to January 13th. January 7th being when the file is opened up in Pennsylvania, and January 13th when the adjuster Stanford is hired to go out to do the investigation,

determine how the claim should be handled.

And the file reflects that the person who was handling the assigned claim was out sick three days. It was a two day weekend. I don't have any problem with that time frame.

Q Do you have any opinion, sir, as to whether the insurance company did anything wrong during that time period?

MR. ANGINO: Objection, Your Honor. Doing wrong?

THE COURT: I think the question is was that period of time an acceptable period of time for performing the appointment of an appraiser in this case?

A I think the facts are that it was—since the person was sick and out three days and there is the weekend, it seems perfectly appropriate and perfectly fine to me that time frame.

BY MR. ZELLE:

Q What is your next time period?

A January 13th to February 7th.

Q What happened?

A That is the dates that the investigation was done by Stanford on behalf of Northbrook. Stanford is Northbrook as a practical matter for the purpose of handling the claim. That is who they hired to do the work.

And I think that was done more than good faith. I think that Stanford did an expeditious—they did a very

good job, and they did it in a very reasonable amount of time.

February 7th was when the investigation terminated. They didn't need to do anything else in terms of the investigation knowing what to do because by that date, it is clear from the file that they concluded that the way to handle this claim was to have the equipment repaired.

Can I go on with the answer to say—explain something?

Q Let me ask you a question, Mr. Windt. If you now look at the time frame from December 17th until February 7th, that is just a week short of two months, is that an acceptable period of time for an insurance company to complete an investigation into the adjustment of a piece of property, in this case a big drill?

A Sure, that would be reasonable, two months. But that doesn't change the fact that Stanford did a pretty quick job, and they were able to do it within less than a month.

So I am saying it doesn't change the fact that when the initial notice was sent to Northbrook, they were sloppy.

Anyway, what I wanted to explain is what you are trying to accomplish in this investigation is to figure out how to handle the claim because you have a few options. One option which is available is if this property is not worth

repairing, it is what you call a total loss, then you would handle a claim a certain way and owe a good deal of money to the insured.

If in fact the property is repairable for a reasonable amount of money, then you would move forward with the repairs. So a fundamental decision you have to make is is this a case where I am going to repair it—ie. the insurance company. Not that you repair it, you pay for the repairs—the insurance company pays for repairs—or is this a case where the insurance company is going to pay for the equipment as if it is a total loss? It is a fundamental decision that has to be made.

You don't just sit back and think here is what I am going to do. You have to do a lot of work. You have to get a lot of input from people you call from the outside world. You have to call people to find out what they view the actual cash value to be. Because if the actual cash value is $50,000.00 and it costs $50,000.00 to repair, you are not going to repair it.

You have got to know what the actual cash value is. You don't just call one person; you call a series of people. Especially—I don't want to belabor it. Now find out actual cash value.

You would want to find out what the salvage is if you don't repair it. Because let's say that the actual cash value was

$150,000.00 and the salvage value—what someone would be willing to pay even if it is in a damaged state—is $140,000.00. So if it is $150,000.00 to repair and salvage value is $140,000.00, and it costs $50,000.00 to repair, you are not going to repair it.

Q Mr. Windt, let me just—

A You have to make those kinds of—I don't want to belabor this. I thought it was needed to be explained some of what you need to do, what takes you a month or two to figure out what to do.

Q The jury has heard evidence about what had to be done. The question I would like you to address, Mr. Windt, is whether a period of time from the 17th of December through February 7th was a reasonable period of time to get the claim investigation completed?

A Yes. The same answer I had before, yes.

Q What is the next period of time that you feel—

A February 7th through the time the repairs were completed, which I think was June 23rd or thereabouts, June 24th.

Q Can you tell us what transpired during that time period on which you base your opinion?

A I don't see how you can possibly fault the insurance company for anything during that period of time. The insurance company had made the decision as of February 7th that

it pays to repair the property. It will pay for the cost of the repairs, less depreciation.

Now it's up to the insured to get the property repaired, and it is up to the insurance company to then timely pay the amount of the repair bill when the repair bill comes in.

Well, to the extent that the repairs take longer than expected because the repair company that the insured selected has problems finishing the repairs, that is not a reflection on the insurance company.

The only thing that would be a bad reflection on the insurance company is after the repairs were done, the insurance company then sat back and didn't pay the bill, which is not the case here.

Q Are you aware—did you hear the testimony that on June 30th, Northbrook did issue a check?

A They had issued checks prior to that, and then they issued their final payment I think the check was dated June 30th as I recall.

Q What is your next time period after June 23rd, the end of June when the drill repairs were completed?

A The final time period is June 23rd through October, June 23rd or 24th when the repairs are finished and then October, early October when the insured picks up the equipment.

And again, it is—I think it is impossible to fault the insurance company there. The repairs are done. The insurance company did what it said it would do. It paid for the repairs in full.

If the insured doesn't pick up the equipment, it is not bad faith by the insurance company. The insurance company's obligation is to figure out in a timely fashion what to do with the equipment, repair it or not.

The insurance company does that. The equipment is repaired. Then it is the insurance company's obligation to pay in a reasonable amount of time. Clearly, they did that. That is it.

Q You are talking about reasonable amount of time. You have heard all of the testimony this morning and this afternoon. In your opinion, sir, did Northbrook adjust the claim in a reasonable amount of time?

A I don't think that is a fair question because I think no matter how you try to lump it together, there was still the mistake made by Northbrook where—or the sloppiness by Northbrook in the early period.

Q I understand that. I am asking you if you can't look at it as a whole, then that is fine. But I am asking you if you look at the—

MR. ANGINO: Your Honor, this is his witness.

THE COURT: I don't think he is leading him.

Windt—Cross 420

BY MR. ZELLE:

Q If you look at the process as a whole, do you have an opinion as to whether Northbrook accomplished what it was supposed to accomplish in terms of getting the drill adjusted within a reasonable amount of time?

A Yes. That is the answer I gave you twice before. Yes, that is true.

MR. ANGINO: That is all I have.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. ZELLE:

Q Your decision and the opinions that you have expressed are based upon the fact that Northbrook made a decision on February 7th, 1997 to have this drill repaired; is that right?

A That is when Northbrook finished its investigation of getting estimates on repairs on actual cash value, on salvage value. At which time based on the numbers that it received, it could decide on a course of action. So in other words, you need to do that investigation, that analysis within a reasonable amount of time.

We know because of the file. There is no question about it. We know they finished that process by February 7th.

Q Did they make a decision—did Northbrook make a

decision on February 7th to have that drill repaired?

A They made a decision to go forward on the assumption it was going to be repaired. And I suppose anything is possible. If they opened up that machinery and found out that it had the plague, then maybe they would change their mind.

But first, you have to decide on a course of action. And you can't be a knucklehead about it. To the extent that despite getting six estimates from six different companies if based on what expertise everybody had in making their estimates and analysis, if it all turns out to be wrong, you don't just say I don't care if it is wrong, this is what I am doing. That would be silly.

Q Would you look at Plaintiff Exhibit 7, please?

THE COURT: That is in this folder.

A Yes, I have it.

BY MR. ANGINO:

Q It is set up in a chronological order. Would you turn to what appears to be 2/13. Do you see that?

A Yes.

Q Would you turn to the next page, please?

A (Witness complies.) Yes.

Q Are you familiar with that particular page?

A I have looked at it before, yes.

Q And you had explained to the jury that there are various

things that an insurance company can do; is that right?

A In essence, in other words, the insurance company under the policy is obligated to pay the lowest amount of certain options.

Q They are not obligated?

A Have the right.

Q They can?

A I could give you money. Even though we don't have any relationship, you are always free to give money away. The question is you have a certain right. I have a right not to give you money. And they have a right to pay just repairs rather than total loss value.

Q What I am saying to you is that you have given advice and you are called in by various insurance companies to do certain things with regard to potentially large claims; is that right?

A I work for insureds, too. And not every claim I handle is a large claim, but usually they are.

Q There are factors—individual factors in each situation; is that right?

A No two cases are the same.

Q So this particular case involves a company that has a particular type of drill; is that right?

A Yes.

Q And that particular type of drill is important to that particular company to pursue its business; is that right?

A That is my understanding, yes.

Q Is that a factor to consider?

A Possibly.

Q The next thing we know is that you can go out and conduct an investigation, but until you tear that drill apart, you don't know what it is going to cost to repair it; is that right?

A Well, as evidenced by this case, they knew almost to the dollar. But there is no sure thing in life I have found. I don't mean to pontificate.

As I told you before, you got to keep your eyes and ears open if. Because if something unforeseen develops, you have to be able to react to it. Nothing unforeseen developed here. Stanford did a great job.

Q You are familiar with this particular case, and you are familiar with Stanford's appraisals of what it was going to cost to repair; is that right?

A Yes.

Q The appraisals that he got—and he got six of them he said?

A Yes.

Q How much did—what was the range of them?

A He only wrote up as I recall three of them because I

think the insured wouldn't look at the other three. You know, the report that was marked and not admitted into evidence, I obviously read that.

On that report, I won't say what it says, but it does I am pretty sure mention at least one or two more beyond the three that were written up.

Q That's right. The three that you have been privy to, what were the amounts?

A I think the estimate from Stanford, which is the only one I remember off the top of my head—

Q You don't mean Stanford.

A No, I mean Stockdale.

Q How much was the one from Stockdale?

A I think it said $40,000.00, but it was subject to certain things they didn't know which could make it as much as 50.

Q Right.

A Or a little under 40.

Q So you had at that time an appraisal from Stockdale that was about $40,500.00, but if certain things happened it could be $50,000.00; is that what it said?

A I don't think it said that, but that is my understanding that it could go as high as 50. Not that anyone expected it too, but that was within the realm of possibility.

Q And on the down side, there just seemed to be a little down side; is that right?

A It is not something I really focused on. I don't recall there being a significant potential for it being a lot less than $40,000.00.

Q Forty to fifty would be the range from the company that Syracuse wanted to have it done; is that right?

A No. I think the range was—it depends what you call range. The range could be 40 to a million. I mean that is silly to say a million, but you don't know. They thought it would be about $40,000.00.

Q 40 to 50?

A No. They thought it would be about $40,000.00.

Q Now we know that if you are going to repair something, you are going to have to take that machine first to a shop to look at it to find out how much it is going to cost to repair; is that right?

A Well, you have an estimate, but the estimate is not binding on Stockdale because they haven't seen the equipment yet. So, again, you are dealing with professional people, Stanford, Stockdale. They have analyzed the problem.

Stanford has explained it to Stockdale and gone through it piece by piece it is my understanding. I wasn't there, but that is my understanding. They have come up with the belief that this can be repaired for approximately $40,000.00.

Does that answer your question?

Q No.

A Sorry. I forgot the question.

Q Do you know there were two moves involved here? This particular drill was first moved to find out how much it is going to cost to repair. Do you know that?

A No. My recollection is there was one move from the site where it was damaged to Stanford—Stockdale. Too many S's in this case.

Q You are saying there was only one move?

A I only remember one move for $5100.00. When it was finished, it had to be moved not back to the site it was, but back to Maryland. And that was another 21, 22 hundred dollars.

Q So you knew it had to be moved, and it had to come back. So you have—

A It didn't go back. It went to Maryland as I said.

Q Whatever. So that is a figure of $7200.00; is that right?

A Something sticks in my mind that $7300.00 is the right number, but maybe your right.

Q Whatever. When you are going to make a decision as to whether you repair or replace, you obviously with this type of a piece of equipment have to factor in there is going to be

a cost to get it to where it is?

A Absolutely.

Q So in this case when we had $40,500.00 to $50,000.00 depending on what it is, we basically had something that would be—nobody knew exactly what it was going to cost to move at the time anywhere from $47,000.00 to $57,000.00; is that right?

A That is not a correct way to analyze it. From the insurance company's point of view, they expected to spend about $36,000.00 for repairs, $40,000.00 less depreciation of about $4,000.00. They expected to pay about $36,000.00 for repairs. And we will use the $7300.00 number for a move.

So if I were handling the claim for the insurance company, I would say if we repair this, I expect it is going to cost the company $43,300.00.

Q But—?

A So that is the first part of the equation. One can't know the answer to that equation until one does the work that Stanford did.

Q Stockdale?

A Stanford did. At that time, actually I was right. That Stanford did between January 15th and February 7th.

Q So with the best knowledge that the insurance company had at that time, they were looking at $43,300.00; is that right?

A That is what they would expect to spend.

Q Now if you are going to spend $43,300.00, you know it is going to take time; is that right?

A Yes.

Q And were there calculations done on the basis of salvage that is in Exhibit 7 that I have addressed here?

A I don't know if it is Exhibit 7, but I have seen the salvage estimates. I think there were six of them.

Q Was there one between 80 and 90?

A Yes.

Q Is there an actual calculation in the diary of Northbrook that starts out with $140,000.00?

A Yes. That is an incorrect calculation, but there is a calculation there.

Q There is a calculation?

A Yes.

Q It says ACV $140,000.00. That is the policy limit; is that right?

A You wouldn't use 140. You would use the actual ACV. It also says policy limit. The relevant number would be ACV.

Q What is the ACV?

A The insured said 160. He said it in his deposition. He testified again today on the stand because I heard him that he thought it was 160.

Q But he can't get more—

A He wouldn't get more than 140. The question is you start with ACV. According to the insured, it is 160. That is what they are insisting on. If you subtract out the maximum possible salvage value of 90, then you are left with $70,000.00 cost to the insurance company.

Q So what I am saying to you though is were there—was there actually an exhibit supplied by the plaintiff from a company that gave the value of that particular drill at or about that time?

A There were I think six estimates that Stanford got on actual cash value. I am just saying that if you wanted to settle with the insured, which is what you are suggesting, the insured says you start with 160 as actual cash value. Who knows what you are actually going to get for salvage because the insured hasn't let people get on the site to look at it.

Let's say you get 90, which is far more than the average. The average salvage value that he obtained was 60. Let's say you use 90. 160 minus 90 is $70,000.00 to satisfy the insured.

(1/30/97 letter from D&L Thomas Equipment Corp. Re: value of drill before 12/13/96 was introduced as Plaintiff Exhibit 16.)

BY MR. ANGINO:

Q Would you look at Plaintiff Exhibit 16, please?

A Sure.

Q Is this a letter from Nicholas B. Goulas to Jay DeLine of Syracuse Exploration?

MR. ZELLE: Objection. This hasn't been offered into evidence.

MR. ANGINO: I am introducing it now.

MR. ZELLE: I will object because he can't authenticate it.

THE COURT: I think we have to let the question go on a little further here.

BY MR. ANGINO:

Q Are you familiar with this particular document?

A Yes, it was in the file that I saw.

Q It's in the file you looked at and referred to in appearing here in court; is that right?

A Yes.

Q And as of January 30th, 1997, which is during this period of time when you said this investigation was being conducted during which time there has to be a decision made with respect to do you go the salvage route or do you go the repair route, a letter is from Nicholas Goulas to Jay DeLine; is that right?

A Yes.

Q And it gives a price range for that particular piece of equipment as $130,000.00 to $145,000.00; is that right?

A Yes.

Q So whatever the—Syracuse supplied that to Northbrook; did they not?

MR. ZELLE: Objection.

A I don't know.

BY MR. ANGINO:

Q You don't know?

A How would I know?

Q In terms—do you see the claim number on it? It says claim 3771001982?

A Yes.

Q Is that the claim for Northbrook?

A I presume. I saw this in Northbrook's file.

Q You saw it in Northbrook's file?

A Yes. I don't know how they got it. You asked me how they got it. I don't know.

Q How do you expect a letter to Syracuse Exploration would get in the Northbrook file?

A Either they got it—Mr. Stanford got it from D&L Equipment because it was one of the six people he called, or he got it from Syracuse. How would I know?

Q If Mr. DeLine is going to give a price to Northbrook for the value, the ACV, he has gotten a written document that says 130 to 145?

A And his position is it is wrong. His position is as he

testified today it was 160. So what do you want from me? I am not going to impeach your guy.

Q You are in the insurance business. If you are adjusting a claim, do you want something in writing from somebody telling you what the value of something is?

MR. ZELLE: Objection, Your Honor. I think we have got that there was a letter that said one thing, and we have Mr. DeLine's testimony. We can move on.

THE COURT: The question was on a different tack.

BY MR. ANGINO:

Q If tack is in order for an insurance company—and you have been dealing with them for years?

THE COURT: Don't intersperse the question with editorializing, Mr. Angino. Just ask the question.

BY MR. ANGINO:

Q Do you need to have something in writing as to the value of that piece of equipment?

A You don't need to. It is good practice because sometimes, believe it or not—never mind. I was just trying to be cute, but that is not appropriate.

Q You know what Mr. DeLine paid for it?

A 140.

Q He paid 140?

A $140,000.00.

Q Insured it for $140,000.00?

A The maximum coverage on it was $140,000.00.

Q And submitted a document for 130 to 145 as far as its value; is that right?

A Again, I don't know who submitted it. I know he got the letter. It is addressed to him. And I know his position all along has been that this letter is wrong. It is worth 160.

Q Where do you get that?

A Because I read his deposition. I heard his testimony today. I read the file. I mean what do you want me to say?

Q Did he say this was wrong?

A He said it is worth 160. He gave his testimony under oath both at his deposition and today. If you are calling him a liar, call him a liar. I am not.

I am just saying the insurance company, if you are going to say—never mind. I don't know what you are trying to—if you want me to make your client look bad. I just want to tell you my opinions based on what I understand the facts to be.

Q The facts are that Northbrook used 140, did they not, to calculate salvage and to calculate replacement; did they not?

A The person that did that—

THE COURT: Can you answer that question?

A No. It looks like they used 140 because that was the

policy limit which is not how you do the equation.

BY MR. ANGINO:

Q Do they have ACV before it?

A And then a policy limit written after it.

Q But they have ACV before it?

A I said before they have ACV before it, and it says $140,000.00 policy limit. And you wouldn't use the policy limit in the equation.

THE COURT: I think we are getting into more argument than we need to, gentlemen. Do you have any more questions you want to ask this witness?

MR. ANGINO: I would like to finish this. I would like to—

THE COURT: I don't know what you are driving at at this point.

MR. ANGINO: What I am driving at is—

THE COURT: You don't have to explain to me. Go ahead with your questions.

BY MR. ANGINO:

Q Does that start with ACV of 140?

A The letters ACV are on there, and then after the number it says policy limit. I can't tell you anything more than what it says.

Q But it has—

THE COURT: We will let the jury interpret what the

meaning of those letters are and the numbers.

BY MR. ANGINO:

Q Does it have the word sal with $90,000.00?

A Yes.

Q Does it have $50,000.00 after that?

A Yes.

Q Does it have $1,000.00 after that?

A Yes.

Q So that at this point in time, you have indicated the repair cost as estimated from the insurance company was $43,300.00; is that right?

A Correct.

Q And the figure here is $49,000.00; is that right?

A The incorrect figure on that piece of paper is $49,000.00.

Q So that at this point in time, the insurance company opted to go with the repair; is that right?

A Obviously, it opted to go with the repair, yes.

Q And that repair therefore meant that this machine was not done until June 25th; is that right?

A Correct. That is how long the repair took.

Q So that the decision that was made then to save $5700.00 meant the machine would not be getting to Syracuse for another March, April, May, June, four months; is that right?

A I disagree with your question for the reasons I have already explained. The correct number would be $70,000.00 as opposed to $43,000.00.

MR. ANGINO: No further questions.

MR. ZELLE: Brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. ZELLE:

Q If Northbrook had decided to simply pay the $50,000.00, would Mr. DeLine have had his drill back any faster?

A Not as far as I know.

Q He would have had $50,000.00, but he still wouldn't have his drill, and his drill couldn't have been repaired any faster based on what you have looked at; could it?

A All I know is from what Mr. Stanford testified that if he had taken Mr. Stanford's recommendation of using Carbough, that he would have had it quicker.

Q But—

A That is all I know.

MR. ANGINO: I have to ask one question.

A Sure.

RECROSS EXAMINATION

BY MR. ANGINO:

Q Mr. DeLine wouldn't have gotten—he would have gotten $140,000.00 to go out and by a drill; is that right? Under the salvage basis, the company keeps the salvage for the 90, he

gets $140,000.00. He can go out and buy a drill?

A Right. If this was a total lose, if the insurance company determined it was a total loss, they would pay $140,000.00 and typically keep the rest as salvage value under the terms of the policy.

Obviously, they opted the much cheaper route which they had the perfect right to do legally, which was to end up paying $43,000.00 and change.

Q What I am saying in response to Mr. Zelle's question is the calculations that are done here give Syracuse 140, and they can go out and then buy a drill; right? That is the calculation?

A That is not what they did with the money. The idea is should the insurance—was the insurance company obligated to give your client $140,000.00 rather than having it repaired which they expected would cost them $43,000.00?

And the answer is obviously since they had the right under the policy—it is not unusual; it is a standard policy—to only pay $40,000.00, who in their right mind would pay $140,000.00 and then supposedly be guilty of bad faith because they elected to pay what they had the right to limit their obligation to, which is $43,000.00?

Q Did the repairs come out to be $50,000.00?

A I am talking about what their obligation to pay was.

Q Didn't it come out to be fifty some thousand?

A It was another 2500 more than what they expected to pay.

Q What was the final repair bill?

MR. ZELLE: Beyond the scope, Your Honor.

A The final repair bill was $44,000.00 and change less the $4,000.00 in depreciation. My recollection is it ended up costing $40,000.00 to the insurance company. But I could be off slightly.

THE COURT: All right. Is that all?

MR. ANGINO: Yes.

THE COURT: Thank you.

A Thank you, Your Honor.

MR. ZELLE: Is defense rests, Your Honor.

THE COURT: Very well. Any rebuttal testimony, Mr. Angino?

MR. ANGINO: If I could have one minute, Your Honor.

THE COURT: Yes.

MR. ANGINO: Your Honor, Plaintiff Exhibit Number 34 indicates that the final repair bill—

MR. ZELLE: Objection, Your Honor. Is he offering the exhibit?

MR. ANGINO: Yes.

MR. ZELLE: Let me take a look at it, and I will let you know if I have any objection. There are two exhibits ... .

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

97-CV-1405

SYRACUSE EXPORATION COMPANY,

Plaintiff

v.

NORTHBROOK PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant

TRANSCRIPT OF PROCEEDINGS

VOLUME 2

BEFORE: HON. WILLIAM W. CALDWELL, Judge

DATES: June 8 and 9, 1999

PLACE: Courtroom Number Three
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

RICHARD C. ANGINO, Esquire
For—Plaintiff

ANTHONY ROBERT ZELLE, Esquire
For—Defendant

Vicki L. Fox, RMR
Official Reporter

... this company is certainly good for any punitive award that it might enter in this case, which is a rather small case when you compare it to the size of the company.

MR. ANGINO: Sure. What is the time we are going to start tomorrow, Your Honor?

THE COURT: Nine.

MR. ANGINO: Thank you. Do you want to start with the jury charge conference tomorrow morning or closing arguments?

THE COURT: I don't plan to hold a charge conference. I don't usually do that: The law is very clear here.

MR. ZELLE: That is fine. I would like to know when if I have any objection to the jury charge—I don't want to do it in front of the jury obviously.

THE COURT: I think after I deliver my charge if you have any objections, you can come to sidebar, and we will put them on the record.

MR. ZELLE: That is fine. Thank you.

THE COURT: I will correct anything that I misquoted to the jury. But I have charged jurors on this exact thing, and I think my charge is within the limits of the law.

MR. ZELLE: Your Honor, I would certainly never suggest that it wasn't.

AFTER RECESS

THE COURT: Thank you, ladies and gentlemen. I am sure at this point you don't need me to tell you the very important role that you play in the administration of justice and, of course, in this specific case.

This is because the determination of the facts in this case is exclusively for you. It's your duty as jurors to follow the law that governs the case, and you shouldn't disregard what I tell you about the law. But as to the facts in the case, you collectively are the exclusive judge.

In arriving at the facts, you must consider only the evidence in the case. But you are, of course, permitted to draw such reasonable inferences from the testimony and the exhibits that you feel are justified in light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts. If your recollection of the evidence differs from anything that might have been expressed by counsel or that I might say, it is your collective recollection of the evidence which should govern.

If the inferences that you think should be drawn from the facts differ from anything that has been suggested again, follow the inferences that you think should be drawn.

And if your judgment of what the evidence has proved differs from what might have been argued or suggested by counsel or anything that I might say, follow your own judgment.

You are not to infer from this that you are to ignore what counsel have said to you in their closing arguments. It is not only your right, but it is your duty to consider their arguments and to view and examine the evidence in light of what they have said.

However in the final analysis, you have the right to reject any argument that you don't think follows from the evidence because the determination of the facts in this case is exclusively for you.

Your verdict must be unanimous. All eight of you must agree in a result before we can accept it as a verdict.

As we well know, this is a civil action brought by Syracuse Exploration Company against the Northbrook Casualty or Property and Casualty Insurance Company.

In every civil proceeding, whether it is in a state or a federal court, a person or a plaintiff who makes a claim against another has what we call the burden of proof. The burden of proof sometimes depends upon the type of claim that is being made.

In this case where the defendant is being accused in dealing with the plaintiff in bad faith, the law requires the

plaintiff to satisfy you, the fact finders, that it is entitled to recover by clear and convincing evidence.

Clear and convincing evidence is evidence that is so clear, direct, weighty and convincing that you can come to a decision without hesitation.

Most civil cases have a less strict burden of proof. In most civil litigation, a plaintiff must prove a case by what we call a fair preponderance of the evidence.

Proof by a preponderance of the evidence is proof that a point being advanced is more likely so than not so. Proving a case by clear and convincing evidence is a heightened standard imposed by the law in cases where bad faith is claimed.

As I mentioned at the beginning of the case, one of the most important functions that you serve as a juror is to judge the credibility of the witnesses. And by credibility, we mean the worthiness of belief in what a particular witness says.

You must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you might attach to it.

Credibility is not limited to just truthfulness or the lack of truthfulness; although, of course, that is obviously very important. But credibility also includes accuracy of recollection, accuracy of observation, and whether a wit-

ness is giving dependable testimony that you can use in performing your fact finding function.

It is possible that a witness intends and desires to tell the truth and yet through faulty memory, poor observation, the passage of time or for many other reasons is honestly mistaken. So you must determine how much of the testimony is truthful, as well as how much is reliable and correct.

In passing upon the credibility of each witness who testifies, you have a right to assess their apparent accuracy of memory and observation, their appearance and conduct as they testify, and the manner in which they testify.

Do they seem to be forthright? Did they show any bias? Are they evasive? Are they candid and fair in what they tell you? You can consider all the surrounding circumstances in judging credibility, including the interest that a witness might have in the outcome of the case.

The parties, themselves have an obvious interest, but it is possible that other persons who testify have a less direct interest in the case and for some reason may have cause to color their testimony.

You must attempt to reconcile conflicting evidence, then determine what testimony is worthy of reliance and belief and what is not.

There was one witness called in this case to testify that we call an opinion witness. Northbrook called a witness who expressed opinions about how Northbrook handled the plaintiff's claim.

I will tell you just a word or two about evaluating the testimony of someone who testifies and is permitted to express an opinion.

Frequently the issues in a case involve matters of specialized knowledge or experience that can't be determined from deductions or inferences drawn on the basis of our everyday knowledge, common sense or practical experience.

Issues of this kind create the necessity for the admission into evidence of the opinions or conclusions of people who are shown to be qualified and experienced in the particular field in question.

However, you should also realize, as I am sure you do, that a witness's opinion is just that. It is an opinion. It creates no fact. It is what the witness thinks about something. And the thought may be accurate or inaccurate and yet represent the honest conviction of the person who expresses it.

The importance of or the weight to be given to opinion testimony is again exclusively for you to decide. In determining the weight to be given to that testimony, consider the qualifications and credibility of the witness

and the reason he gives to support his opinions.

While opinion witnesses may have special knowledge on a certain subject, their testimony is evaluated in the same way as other witnesses. So in evaluating the opinion of an expert witness, as we sometimes call them, you should as in any other case apply your common sense, your good judgment and your experience as you weigh the opinion given and the basis for that opinion.

You are not bound to accept the conclusion of an opinion witness if your judgment of all of the evidence leads you to reject the opinions that have been expressed.

Of course, Northbrook is a corporation as is the plaintiff, and these companies can act only through its employes or agents. In general, a corporation is liable for the conduct of its employes or agents who act within the scope of their authority. And in this case, there is no dispute that the representatives of the two corporations acted within the scope of their employment and authority.

Both parties in this case are corporations, and the law treats them the same as it would treat an individual litigant.

This brings us then to the specific issue in this case, and that is the issue, of course, of bad faith. The attorneys have expressed in summary form their own understanding of the law in the area of bad faith.

In a case like this it is necessary for them to some extent to refer to the law. But in our system of jurisprudence you, the jury, must take the law on the subject before you from the Court.

Because of the importance of this law in resolving this case, I would ask that you listen carefully as I explain the law concerning bad faith and what a claimant is required to show in order to prevail.

As we all know, this suit involves the allegation that Northbrook acted in bad faith in handling the claim presented to it by its policyholder Syracuse Exploration Company for damage to a drill that had been insured.

There is a statute in Pennsylvania—and Pennsylvania law governs this case—that requires an insurer to deal in good faith in handling the claims of its insureds. And plaintiff contends that the defendant violated this law.

Your responsibility will be to determine whether bad faith has been shown by all of the evidence remembering that the burden of proof requires the plaintiff to prove bad faith by clear and convincing evidence.

While the Pennsylvania statute does not define bad faith, it has been given a well defined meaning in the Pennsylvania Courts that have interpreted this law. Bad faith is defined as any frivolous or unfounded refusal to pay

what is due an insured.

For the purposes of a claim against an insurer for bad faith in failing to pay a claim in a timely fashion, negligence or poor judgment in handling a claim is not bad faith. Even gross negligence by an insurer is insufficient to support a finding of bad faith.

Now it is not necessary that the insurance companies be fraudulent. Rather bad faith can exist where an insurance company's evaluation of a claim is less than honest and objective. That is because an insurer has a duty to act in good faith, and good faith requires that the insurer act honestly and objectively in evaluating a claim, that it promptly adjust and pay a valid claim without unnecessary delay, and that an insurance company give its insured's interests the same consideration as it gives its own.

In addition to providing a general definition of bad faith, Pennsylvania Courts have developed a two part test to determine whether bad faith exists. This is the test you should apply in determining whether Syracuse has established by clear and convincing evidence that Northbrook acted in bad faith.

The first element in this test is whether the insurance company had a reasonable basis for any delay that resulted in paying its insured's claim. If you find that Northbrook did not respond promptly to plaintiff's claim or delayed in issuing a

decision concerning repair or replacement, you must determine whether Northbrook had a reasonable basis for its actions.

Remember, however, that whether a person acts reasonably is not the same as whether he has acted correctly. A person can be incorrect in a decision or an action and yet still be reasonable under the facts as they were known at the time the decision was made or an action was taken.

The second element of the test for bad faith that must be shown is whether the insurance company knew that it lacked a reasonable basis for delaying payment of the claim or recklessly disregarded the question of whether it lacked a reasonable basis for its action.

Thus if you find that there was no reason for Northbrook not to promptly authorize repair of plaintiff's equipment and payment of its claim, you must then determine whether it knew that it had no reasonable basis to delay or recklessly disregard the claim.

In this context, to recklessly disregard facts means to consciously disregard them. An example would be a situation where Northbrook had no reasonable basis to delay authorizing the repairs to plaintiff's drill, but did not know it had no basis to delay because it had not conducted an investigation and evaluation in a timely fashion.

If you find that Northbrook consciously decided for improper reasons not to investigate or evaluate or consciously decide to delay plaintiff's claim, then you could find it acted in bad faith.

However if you find that Northbrook did not consciously fail to resolve plaintiff's claim in a timely fashion, there would not be bad faith.

In other words, Northbrook or any other insurance company is not permitted to bury its head in the sand to avoid determining whether a claim should be paid. If there was a delay in evaluating or paying a claim, ask whether there was a reasonable basis for the delay. If so, there can be no bad faith.

Remember the plaintiff must prove both elements of the test for bad faith by clear and convincing evidence, not merely by insinuating that Northbrook acted in bad faith. As I stated earlier, clear and convincing evidence is evidence that is so clear, direct, weighty and convincing that it enables you, the jury, to make a decision without hesitation.

Now this is not a situation where you look back and say what might have been done better by Northbrook with regard to plaintiff's claim. In other words, we don't engage in Monday morning quarterbacking.

What you must and should do is consider the information Northbrook had at the time these events transpired. And also look at what Northbrook and its agent Stanford did in handling the claim.

You may consider how Northbrook responded to the initial notice of loss, the process by which it determined that the drill should be repaired rather than replaced, and the manner in which it issued payment for the claim.

Remember, however, that the Court has already determined that Northbrook has paid Syracuse the proper amount for repairing the drill. So the only issue for you to decide is whether Northbrook's handling of that claim was done in bad faith.

That brings us then to the question of damages that might be filed—might be applied here in the event of bad faith.

The Pennsylvania bad faith statute allows an award of punitive damages if you conclude that the insurance company acted in bad faith. So if you find bad faith, you must then determine whether plaintiff should receive punitive damages.

These damages are awarded in exceptional cases as a punishment of a defendant and as a warning to others to keep them from acting in the same manner.

Punitive damages are appropriate only where a defendant's conduct is especially egregious. The burden of proof in this case—in this part of the case as to the imposition of punitive damages is by a fair preponderance of the evidence.

As I said earlier, the burden of proof by fair preponderance of evidence means proving that something is more likely so than not so. Another example is using the scales of justice, and if the evidence for plaintiff tips the scales even slightly on a particular point, then he has prevailed as far as proving that point by a fair preponderance of the evidence.

You may award punitive damages if you determine by a preponderance of the evidence that the defendant's conduct was outrageous, done with an improper motive or with a reckless indifference to the interests of its policyholder Syracuse Exploration Company.

In this context, the term reckless means that the defendant knew of a risk of a harm to the plaintiff, and it deliberately proceeded to act or failed to act in conscious disregard of or indifference to that risk.

Punitive damages are not to be lightly imposed and may not be awarded for misconduct that constitutes such things as carelessness, negligence, inadvertence, mistakes and errors of judgment. Nor may they be awarded for conduct that

rises only to the level of gross negligence.

Simply put, before punitive damages are appropriate, it must be shown that a defendant's conduct was outrageous.

To summarize, if you determine that the actions of Northbrook's employes or agents constituted bad faith, you may impose punitive damages only if the following factors are present: First, the conduct must be clearly outrageous; and second, the actions must not have been done to satisfy an individual's personal will or malice, but with the intent to further the interests of the insurance company Northbrook.

If you conclude that the facts justify an award of punitive damages, you should try to determine a fair, just and reasonable amount for the plaintiff under all of the circumstances.

As I said, punitive damages are not intended to compensate a plaintiff for injury, but rather are designed to punish a defendant and to prevent similar conduct in the future.

In considering an appropriate award, you may consider the character of Northbrook's actions, the nature and extent of the harm to Syracuse which Northbrook caused or intended to cause, the financial condition of the defendant insofar as it is relevant to fixing an amount which will punish and deter it.

Charge of the Court 492

Any award you make must be unanimously agreed upon and must be reasonable under all of the circumstances.

Now it doesn't follow that punitive damages must be awarded if you find that Northbrook acted in bad faith. Whether punitive damages should be paid is a separate issue, and plaintiff must prove by a fair preponderance of the evidence that the circumstances in the case warrant the imposition of imposing a punishment of this nature on the defendant.

In effect, you have the discretion as to whether the situation calls for an award of punitive damages.

Finally, you should know that in addition to permitting an award of punitive damages for an insurer's bad faith, the Pennsylvania Act also provides for certain other categories of recoverable damages and costs.

However, the Act provides that these items are awarded by the Court at a later point if you find that the defendant acted in bad faith. So you will only be dealing with the question of punitive damages.

Gentlemen, that concludes my charge. I would next intend to go over the verdict form with the jury unless you have exceptions to what I have said so far or any requests for further instructions.

MR. ANGINO: Can we take one minute?

THE COURT: Sure. Indulge us for just a moment,

ladies and gentlemen.

(There was an off-the-record discussion at sidebar.)

THE COURT: I have asked Mrs. Michael to provide each of you with a copy of the verdict form as it may be of assistance to you in deciding the case. All of the exhibits will come over to you after you retire, and you may look at all those exhibits. And they are a part of the evidence in the case that you may consider.

The testimony of the witnesses is something you are going to have to recall collectively. Because at this point, we really don't have any way of telling you what a particular said on a particular point.

But if you do have a question about anything like that, we will certainly attempt to assist you. So don't hesitate to present it to us.

If you have any questions about my instructions, or the law, or you want further explanations or clarifications, just send me a note, and we will certainly accommodate you in that regard.

Insofar as the verdict form is concerned, I think you will see that it pretty much tracks what I have said to you in my charge.

First, has the plaintiff proved by clear and convincing evidence that defendant acted in bad faith in the handling of

plaintiff's insurance claim? And by unanimous agreement, you simply check the no or the yes line to that question.

If you answer no, then you would sign the form and return to the courtroom. But if you answer yes, you proceed to question two, has plaintiff proved by a preponderance of the evidence that it is entitled to punitive damages? And again, you indicate an answer to that question.

If you answer no, you sign the form. But if you answer yes, you go on to the third question and indicate the total punitive damages to which the plaintiff is entitled.

One of your number should be selected to chair your deliberations. That person will also sign the form where the foreman's signature line is. And we will be prepared to receive your verdict when you reach it.

As I said to you before, this is an important case. It is important to the plaintiff because it feels that its claim was handled improperly and in bad faith. It is equally important to the defendant because it believes that it is being asked to pay for something for which it is not responsible, and that under the circumstances, it dealt properly with the plaintiff's claim.

Your decision should be based upon the evidence. You shouldn't allow any emotion to enter into your deliberations or into your verdict such as sympathy or prejudice

or anything of that kind.

Treat the parties equally, and base your decision on the evidence that you have heard as I am sure you will. If there is nothing further, then we will ask the jury to retire.

(The Courtroom Deputy Clerk was duly sworn.)

THE COURT: Folks, you may retire and we will send the verdict—the exhibits over to you.

(The jury retires to deliberate at 10:45.)

THE COURT: Mr. Zelle, I believe you indicated you wished to put something on the record concerning the charge. I asked you to wait until the jury retired. So at this time, you may place that on the record.

MR. ZELLE: For the record, Your Honor, note Northbrook's objection to the charge specifically on the issue of punitive damages. The objection is simply not to the wording at all, but based on the fact there has been no evidence to support such a charge.

Secondly, as I mentioned and requested an instruction that it is not bad faith for a lawyer to produce records that were never requested. And although an argument would clearly be sought to establish that, I think the charge would be an appropriate point to make that known as well.

THE COURT: Okay.

MR. ANGINO: Your Honor, could I put on the record

my comment to you that since this was a diversity case, I thought the five-sixth state rule would apply.

THE COURT: Okay. Fine. We will be in recess now. The jury is going to receive its lunch at 11:30. I don't think they will be returning a verdict. However, you should be available in the event they have a question. Probably, they won't have a question before lunch, but you never know. If you want to go back to your office—

MR. ZELLE: It's your call. Do you want us to hang around until lunch?

THE COURT: I don't want to say that. Just be somewhere where we can get you in ten minutes or so. Let Mrs. Michael know where you are going to be.

(A recess was taken.)

AFTER RECESS

(The following discussion was had in the courtroom at 1:10 PM:)

THE COURT: Ladies and gentlemen, we appreciate your deliberations and your efforts to resolve this case. We wish to respond at this time to your two inquiries.

The second one, which I will address first, asks whether we could clearly define bad faith in layman's terms and could you give us a hard copy for reference?

It is pretty hard to explain this concept in any way other than what I did. I tried to make it as understandable as possible. We will provide you with a written copy of those instructions, and I am sure with the written copy that you won't have any trouble understanding hopefully what is required to be proved to prove bad faith.

The other question you asked involves Exhibit 34, Plaintiff Exhibit 34, specifically whether the—off the record.

MR. ANGINO: It is the second page of 34. It is a proof of loss. It is not in 34. It would be in 36.

THE FOREMAN: It was in 34 that we had.

MR. ANGINO: They later changed it. 34 is what they first sent, and then later they changed it.

THE COURT: I think we will have a copy now of what you are referring to. Yes, in paragraph nine, there is printing undisputed amount. And your question is does adding that word mean that the plaintiff gives up the right to future claims?

Let me answer that by saying that paragraph nine provides that the insured agrees to accept full payment in satisfaction and compromise of all claims under the policy by reason of said loss or damage.

What was intended by adding the words undisputed amount in my mind at least was not particularly clear, and I

don't think that that should be the focus of the inquiry. Does that in any way assist you?

(The jury indicates in the negative.)

THE COURT: The signing of the regular proof of loss would give up all claims under the policy. A bad faith claim would not be a claim under the policy.

What they meant by undisputed amount when that was printed on there, I don't know. I don't think anybody—whoever put it there, I don't think testified what it was intended to mean. I think it is ambiguous. So I would not suggest that you dwell on it. But, of course, you are free to consider the facts.

Does anybody else—maybe you can clarify what your concern is for me.

THE FOREMAN: Our concern was whether or not the wording even though it was not requested to be worded that way on the check, whether or not that was an intentional way to word that.

THE COURT: I think that is a conclusion that the jury is going to have to consider if you think that it is important on the issue of bad faith.

But I don't think anybody—I don't know that Mrs. Hall was asked. I don't know if she put it on there or who put it on there. Whoever did didn't testify what it was intended to mean. I think it's an ambiguous situation. I don't know how you can

draw too many conclusions about it.

Okay?

A JUROR: My concern was if they cashed the check, does that mean that that case is done? They can't go back later and say that something else was wrong and go back with the difference.

THE COURT: If they cashed the check and signed this release, they can't go back and complain about anything under the policy. But that doesn't preclude the claim that they have brought because I am sure they did sign some sort of a release to get the check which—they have gotten the check.

MR. ANGINO: Your Honor—

THE COURT: Isn't that true? I know you were involved in it.

MR. ZELLE: This should probably be outside the jury—

THE COURT: Yes.

(An off-the-record discussion was had at sidebar.)

THE COURT: I don't feel that I can say any more about that exhibit. I think if there was testimony about how that language was interpreted and why it was interpreted the way it was, that is just something you have to consider.

Legally I think it is an ambiguous two words that—I don't know what it means or what the result of it would be if

it came down to it. That is as much help as I think we can give you. Okay.

THE FOREMAN: Okay.

THE COURT: You have copies of these exhibits, don't you?

THE FOREMAN: Thank you, Your Honor.

THE COURT: Perhaps after further deliberations, you might want to refine the question again if it is really important to you. I don't want to cut you off at all. Based on the question that you have asked, I don't think I can say any more at this time.

Okay. You may retire and continue your deliberations. Thank you very much.

THE CLERK: Court is in recess.

(The jury exits to deliberate in the jury room at 1:18 PM.)

(A recess was taken.)

(The jury has a verdict at 2:05 PM.)

THE COURT: We understand you have arrived at a verdict, ladies and gentlemen. We would like to have the verdict form at this time.

(Handed to the Court.)

THE COURT: You are the Foreperson of the jury, is that correct?

THE FOREPERSON: Yes, sir.

THE COURT: Would you answer on behalf of the jury, please? Has plaintiff proved by clear and convincing evidence that the defendant acted in bad faith in the handling of plaintiff's insurance claim?

THE FOREMAN: No.

THE COURT: Thank you. You may be seated. Ladies and gentlemen, your Foreman has indicated that your answer to the first verdict question is no. Is this your individual answer?

(The jury indicates in the affirmative.)

THE COURT: Is there anyone who does not agree to that answer to that question? All right. We accept this then as an unanimous verdict, and we will enter a judgment in favor of the defendant on plaintiff's claim.

I want to thank you for serving as a juror in this case. It was not an easy one I am sure. I hope that the experience of being with us and serving as a juror has given you a little insight into the operation of the courts on a first hand basis.

I won't ask you whether you enjoyed it, but we do appreciate you being here very much. You may be excused at this time. Thank you.

(The jury exits the courtroom.)

THE COURT: If there is nothing further, we will adjourn.

Charge of the Court 502

MR. ZELLE: Thank you, Your Honor.

THE CLERK: Court is adjourned.

(Whereupon, the proceedings were concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/Vicki L. Fox, RMR
Official Reporter

The foregoing certification of this transcript does not apply to any reproduction by any means unless under the direct control and/or supervision of the certifying reporter.

Errata in original.

Supreme Court, U.S.
FILED
OCT 17 2000
CLERK

(2)

No. 00-309

IN THE

Supreme Court of the United States

SYRACUSE EXPLORATION COMPANY,

Petitioner,

v.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

ANTHONY R. ZELLE
Counsel of Record
GREGORY P. VARGA
ROBINSON & COLE, LLP
Attorneys for Respondent
One Boston Place
Boston, MA 02108-4404
(617) 557-5900

162924

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

19pp

QUESTIONS PRESENTED

1. Did the United States District Court for the Middle District of Pennsylvania ("district court") properly exercise its discretion under Fed. R. Civ. P. 56 by entering partial summary judgment in favor of Respondent Northbrook Property & Casualty Insurance Company ("Northbrook") where Petitioner Syracuse Exploration Company ("Syracuse") failed to proffer admissible evidence to support its claim that it suffered a loss of profits as a result of Northbrook's alleged delay in paying its insurance claim?

2. Did the district court properly exercise its discretion pursuant to Fed. R. Civ. P. 37(b) by striking the report of Syracuse's expert witness where the report was filed more than three months after the applicable deadline for such reports and after the court had heard oral argument on Northbrook's Motion for Partial Summary Judgment?

3. Did the district court properly exercise its discretion in: (a) admitting the testimony of Northbrook's expert witness; and (b) excluding evidence of Northbrook's refusal to renew Syracuse's insurance policy?

4. Did the United States Court of Appeals for the Third Circuit ("Third Circuit") properly review the district court's handling of the jury charges under a plain error standard where Syracuse's counsel did not object or otherwise preserve his right to allege error in the substance of the charges or the procedures by which they were adopted and delivered?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Northbrook Property & Casualty Insurance Company states that it is wholly owned by St. Paul Fire & Marine Insurance Company, a publicly held company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denial of the Writ of Certiorari	4
I. The Petition Should be Denied Because the Errors Asserted in the Petition Implicate the District Court and Third Circuit's Discretion in Applying Properly Stated Rules of Law.	4
A. The Third Circuit Properly Applied the "Plain Error" Standard in Reviewing the District Court's Handling of the Jury Charge.	5
B. This Court Should Not Review The Third Circuit's Decision Affirming the District Court Order of Sanctions Imposed on Syracuse Based on Syracuse's Untimely Filing of its Expert's Report.	6

Contents

Page

C. This Court Should Not Review The Third Circuit's Ruling Upholding The District Court's Exclusion of Evidence of Northbrook's Decision Not to Renew Syracuse's Insurance Policy. 8

D. This Court Should Not Review The District Court's Order Excluding Evidence of Syracuse's Alleged Lost Profits, which was Affirmed by the Third Circuit. 9

II. This Court Should Not Review the Third Circuit's Decision Upholding the District Court's Admission of Testimony by Northbrook's Expert because the Lower Court Properly Applied the General Rule Prohibiting Legal Opinion Testimony. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	10
Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3d Cir. 1977), *overruled on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985)	7, 8
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	6
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	6
Statute:	
42 Pa C.S.A. § 8371	9
Rules:	
Fed. R. Civ. P. 37(b)	i
Fed. R. Civ. P. 37(b)(2)	7
Fed. R. Civ. P. 56	i, 10
Fed. R. Evid. 401	8
United States Supreme Court Rule 10	5, 9

STATEMENT OF THE CASE

This diversity action arises out of an insurance claim for fire damage to a drill rig owned by Syracuse and insured by Northbrook. Although Northbrook paid the claim, Syracuse alleged that Northbrook violated the Pennsylvania bad faith statute, which provides as follows:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. C.S.A. § 8371. Syracuse maintains that Northbrook violated the bad faith statute by unduly delaying the repair of the drill rig and improperly applying depreciation in determining the amount owed under the insurance policy. (*Record, a. 21-25*).[1] Syracuse claimed that it was entitled to recover punitive damages, attorney fees and interest, as well as lost profits allegedly incurred as a result of Northbrook's alleged delay in handling its claim. (*Record, a. 24-25*).

---

1. As used in this Brief, the term "Record" shall refer to materials contained in the appellate record filed in the Third Circuit. References to the Appendix to the Petition appear as follows: "*Petition, App.* ___."

After the close of discovery, Northbrook filed a Motion for Partial Summary Judgment as to the depreciation and lost profits aspects of Syracuse's claim. (*Record, a. 242*). One week after the hearing on that motion, and nearly four months after the July 1, 1998 deadline for submission of its expert disclosure, Syracuse served upon Northbrook the report of its previously undisclosed expert witness, Emil Toften. (*Record, a. 10; a. 344-360*). Northbrook moved to strike Mr. Toften's report as untimely and in violation of the Court's Pretrial Scheduling Order. (*Record, a. 373*).

On October 22, 1998, Magistrate Judge Smyser issued a Report and Recommendation recommending that the district court grant Northbrook's Motion for Partial Summary Judgment. (*Record, a. 361-370*). The district court adopted the Report and Recommendation by Order dated December 31, 1998. (*Record, a. 381-83*). In its Order, the district court observed that Syracuse failed to present any evidence to support its claim for lost profits. (*Record, a. 381-83*). The district court also struck the report of Syracuse's expert and directed Syracuse to pay Northbrook the reasonable costs it incurred in connection with its motion to strike. (*Record, a. 383*).

By Order dated June 3, 1999, the district court granted Northbrook's motions *in limine* to exclude evidence pertaining to Syracuse's claim for lost profits and evidence of Northbrook's decision not to renew Syracuse's insurance policy. (*Record, a. 463*).

During trial, the district court admitted the testimony of Northbrook's expert witness, Allan Windt, over the objection of Syracuse's counsel. (*Record, a. 872*).

At the close of the evidence on June 8, 1999, the district court judge informed counsel that he would not conduct a charge conference and would issue his own charge concerning Pennsylvania insurance bad faith law. (*Record, a. 924*). Counsel for Syracuse did not ask the district court for a ruling on any of its proposed jury charges, nor did he inform the court of his contention that the failure to rule on the proposed charges was improper. (*Record, a. 924-927*).

The district court charged the jury on the morning of June 9, 1999. After the charge was given, counsel were invited to note their objections to the jury charges on the record. (*Record, a. 924*). Counsel for Syracuse did not state a single objection. (*Record, a. 924*).

The jury returned a defense verdict on June 9, 1999. (*Record, a. 1109*). On June 11, 1999, Syracuse filed a Motion for a New Trial charging that the district court committed numerous errors in ruling on motions *in limine*, admitting and excluding certain evidence at trial, and instructing the jury. (*Record, a. 1112*). The district court denied the Motion for New Trial. (*Record, a. 1119-1130*).

Syracuse appealed the district court's Orders granting partial summary judgment in favor of Northbrook, granting Northbrook's motions *in limine*, and denying Syracuse's Motion for New Trial. By Order dated May 26, 2000, the Third Circuit affirmed the district court's rulings. (*Petition, App. 2a*).

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The writ of certiorari is granted sparingly, and is ordinarily reserved for those cases which raise novel or extraordinarily compelling questions of law. The Court should deny Syracuse's Petition because none of the procedural mistakes or errors of law asserted in the Petition is so compelling as to merit this Court's review.

Contrary to Syracuse's characterization of the record, the Third Circuit's affirmance of the district court's judgments does not create a conflict among the circuits on any issue of law. Nor does this case implicate rights under the Constitution or federal law. Indeed, the impact of the Third Circuit's decision will be felt by no one other than the parties. In essence, the Petition is nothing more than a final attempt to obtain further appellate review of decisions which are addressed to the sound discretion of the district court. By this petition, Syracuse asks the Supreme Court to substitute its own judgment for that of the district court which heard the evidence, saw the witnesses, and was in the best position to evaluate the case.

I. The Petition Should be Denied Because the Errors Asserted in the Petition Implicate the District Court and Third Circuit's Discretion in Applying Properly Stated Rules of Law.

Syracuse argues that the Third Circuit should have reversed the district court's judgments because: (i) the district court improperly handled the procedure for charging the jury and failed to issue several charges proposed by Syracuse; (ii) the district court improperly excluded the testimony of

Syracuse's expert witness; (iii) the district court erroneously excluded evidence of Northbrook's refusal to renew Syracuse's insurance policy; and (iv) the district court erroneously excluded evidence of the potential profits and business opportunities Syracuse claims to have lost as a consequence of Northbrook's bad faith handling of its insurance claim by entering partial summary judgment in favor of Northbrook. *(Petition at 7-10)*. Each of these alleged errors implicates the district court's exercise of discretion, and the Third Circuit's affirmation of the propriety of that exercise of discretion, in applying settled rules of law. These rules are derived in some cases from the Federal Rules of Evidence and Federal Rules of Civil Procedure, and in other cases from federal common law as developed in the Third Circuit. Supreme Court Rule 10 discourages granting a petition for the writ of certiorari "when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Supreme Court Rule 10*. This Court should make no exception in this case.

A. The Third Circuit Properly Applied the "Plain Error" Standard in Reviewing the District Court's Handling of the Jury Charge.

Syracuse maintains that the Third Circuit erred by "affirming the trial court's failure" to: (i) hold a jury charge conference; (ii) formally rule on the parties' proposed jury charges; and (iii) issue certain jury charges proposed by Syracuse. *Petition* at 8-9. As both the district court and Third Circuit noted in their respective Memoranda, however, Syracuse's counsel was required to, but did not, object to any aspect of the district court's handling of the jury charge. (*Petition, App. 13a-14a; 22a*). Since Syracuse's counsel did not give the District court an opportunity to correct any of

the alleged errors in its handling of the jury charges, the Third Circuit was required to review the procedure and substance of the charges only for "plain error," and to determine whether any of the errors asserted by Syracuse was fundamental and highly prejudicial. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981). Applying that exacting standard to the facts and circumstances of the case, the Third Circuit concluded that Syracuse's allegations of error "lack merit and do not warrant the grant of a new trial." (*Petition, App. 14a*). The Third Circuit's ruling was consistent with the sound exercise of its judicial discretion, and it should not be disturbed.

Syracuse's contention that its counsel had no duty to "specifically object or take exceptions to" the district court's conduct relative to the jury charges" (*Petition at 13*) is contrary to law. As this Court ruled in *United States v. Socony-Vacuum Oil Co.*, a party "cannot as a rule remain silent, interpose no objections, and after the verdict has been returned, seize for the first time on the point that the comments to the jury were prejudicial." 310 U.S. 150, 238-239 (1940).

B. This Court Should Not Review The Third Circuit's Decision Affirming the District Court Order of Sanctions Imposed on Syracuse Based on Syracuse's Untimely Filing of its Expert's Report.

By Order dated October 22, 1998, the district court struck the report of Syracuse's expert witness as a sanction for Syracuse's filing said report three and one-half months after the deadline established in the district court's pretrial scheduling order. (*Petition, App. 19a*). Syracuse challenges

that Order, and the Third Circuit's refusal to reverse it, arguing that both courts misapplied the legal standard governing the exclusion of evidence as a sanction for failure to comply with a pretrial order. (*Petition at 15-16*). This is not an appropriate basis for granting the writ of certiorari.

Fed. R. Civ. P. 37(b)(2) empowers district courts to sanction a party for failing to comply with a discovery order by "prohibiting that party from introducing designated matters into evidence." Fed. R. Civ. P. 37(b)(2). In the Third Circuit, the decision to impose this sanction is guided by *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-05 (3d Cir. 1977), *overruled on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985). In *Meyers*, the Third Circuit articulated the factors that a court must consider in making this decision:

(a) the prejudice or surprise in fact to the party against whom the excluded witness would have testified;

(b) the ability of that party to cure the prejudice;

(c) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;

(d) bad faith or willfulness in failing to comply with the court's order; and

(e) the importance of the evidence.

Id. As the Third Circuit observed in its Memorandum Opinion, no one of the *Meyers* factors is dispositive. (*Petition, App. 9a*).

Both the district court and Third Circuit applied the *Meyers* factors to the circumstances of this case and concluded that exclusion of the testimony of Syracuse's expert was appropriate, especially in light of Syracuse's prior violations of the district court's pretrial scheduling order. (*Petition, App. 8a-10a; 19a-20a*). The Court should decline to grant the writ of certiorari on this basis where Petitioner merely requests it to substitute its judgment for that of the district court and the Third Circuit.

C. This Court Should Not Review The Third Circuit's Ruling Upholding The District Court's Exclusion of Evidence of Northbrook's Decision Not to Renew Syracuse's Insurance Policy.

In its Complaint, Syracuse alleged that Northbrook's refusal to renew Syracuse's insurance policy following the submission of Syracuse's claim for damage to its drill rig was evidence of Northbrook's violation of the Pennsylvania bad faith statute. Prior to trial, the district court granted Northbrook's motion *in limine* to exclude evidence of the non-renewal of the policy, finding such evidence to be irrelevant. (*Record, a. 463*).

The district court's decision to exclude evidence of the non-renewal of Syracuse's insurance policy was consistent with the sound exercise of judicial discretion. In ruling on Northbrook's motion *in limine*, the district court conducted a threshold inquiry under Fed. R. Evid. 401, asking whether evidence of Northbrook's refusal to renew Syracuse's insurance policy had any tendency to prove or disprove the essential question of fact at trial: whether Northbrook's handling of Syracuse's claim was done in bad faith. (*Petition, App. 12a; 17a*). The district court answered

that question in the negative. (*Petition, App. 18a*). Supreme Court Rule 10 counsels against granting a writ of certiorari where, as here, the Petition asks the Supreme Court to substitute its judgment for that of the district court in a matter left to the district court's sound discretion.

Moreover, the district court and Third Circuit properly rejected Syracuse's contention that Northbrook's refusal to renew the policy, standing alone, could constitute bad faith under the Pennsylvania Unfair Insurance Practices Act. (*Petition, App. 12a; 18a*). The district court dismissed each of the foreign decisions cited in Syracuse's Motion for New Trial on the ground that such cases "do not relate to the Pennsylvania bad faith statute or to non-renewal of insurance based on loss history." (*Petition, App. 19a*). The district court also cited four decisions which stand for the proposition that non-renewal of an insurance policy does not constitute bad faith within the meaning of 42 Pa. C.S.A. § 8371. (*Petition, App. 18a-19a*).

Despite the district court and Third Circuit's unambiguous rejection of Syracuse's authority on the non-renewal issue, Syracuse cites those same cases in its Petition, perhaps with the expectation that this Court will adopt a different view of their applicability. The Court should not indulge Syracuse in such an exercise.

D. This Court Should Not Review The District Court's Order Excluding Evidence of Syracuse's Alleged Lost Profits, which was Affirmed by the Third Circuit.

Syracuse's Complaint against Northbrook also alleged that Syracuse suffered a loss of profits and potential business

opportunities as a consequence of Northbrook's handling of Syracuse's insurance claim. After discovery was complete, Northbrook moved for partial summary judgment on the lost profits element of Syracuse's claim, citing Syracuse's inability to prove those damages. (*Record, a. 242*). Northbrook supported its summary judgment with the testimony of its accounting expert, which further undermined the claim of lost profits. Syracuse elected not to submit countervailing expert testimony, relying instead upon the speculative opinions of its officers. (*Record, a. 324-342*).

When confronted with Northbrook's motion for partial summary judgment, the district court's task under Fed. R. Civ. P. 56 was to determine whether Syracuse had adduced admissible evidence sufficient to demonstrate a genuine dispute as to whether Syracuse suffered lost profits or business opportunities as a result of Northbrook's claim handling. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Based on a review of the evidence, and in accordance with his broad discretion under Rule 56, the Magistrate Judge concluded that Syracuse had not met its burden, and entered summary judgment in favor of Northbrook on that issue.

In its Petition, Syracuse asks this Court to "second guess" the Magistrate Judge's application of the Rule 56 standard to the evidence presented by the parties on the lost profits issue. A trial judge's alleged misapplication of established rules of law is not a valid basis for granting the writ of certiorari. Accordingly, the Court should reject Syracuse's Petition.

II. This Court Should Not Review the Third Circuit's Decision Upholding the District Court's Admission of Testimony by Northbrook's Expert because the Lower Court Properly Applied the General Rule Prohibiting Legal Opinion Testimony.

In a transparent effort to manufacture a conflict among the Circuits and thereby peak the Supreme Court's interest, Syracuse argues that the district court and the Third Circuit permitted Northbrook's expert witness, Allan Windt, to explain the law of bad faith to the jury. (*Petition at 7*). Syracuse's characterization of Mr. Windt's testimony is not supported by the record.

As an initial matter, Syracuse's suggestion that Mr. Windt was presented to the jury as a "legal expert" (*Petition, 11a-12a*) is simply false. The District court qualified Mr. Windt to testify as an expert on acceptable claims-handling practices in the insurance industry only after extensive *voir dire* by the Court and by Syracuse's counsel. (*Petition, App. 31a-45a*). As the Third Circuit noted, Mr. Windt "was called to testify in this bad faith action based on his familiarity with acceptable claims-handling standards and practices in the insurance industry," (*Petition, App. 11a*) not because of his knowledge of the law of bad faith.

Moreover, contrary to Syracuse's mischaracterization of the record, Mr. Windt did not testify in the form of an opinion on the law of insurance bad faith. Based on its review of the transcript of Mr. Windt's testimony, the Third Circuit made the following comments:

> We . . . are convinced that the district court was careful to guard against allowing the expert to

> testify to matters reserved for the Court. We agree with the substance of Northbrook's characterization of the expert testimony: "Noticeably absent from [the expert] testimony is any discussion of (or even reference to) the Pennsylvania bad faith statute, the legal standards governing the determination of liability under the statute, a definition of 'bad faith,' or any other matter exclusively within the province of the district court. Indeed, on the one occasion when questioning by Northbrook's counsel arguably invited an opinion regarding the law of bad faith, the district court sustained the objection of Syracuse's counsel and appropriately limited the scope of Northbrook's counsel's inquiry."

(*Petition, App. 11a*).

In summary, there is no support in the record for Syracuse's contention that Mr. Windt was allowed to supplant the trial judge as the expert on the law. Accordingly, Syracuse cannot plausibly argue that the Third Circuit has adopted a rule concerning the admissibility of legal opinion testimony that is contrary to the rule followed in other circuits. Since there is no conflict among the circuits on this evidentiary issue, Syracuse's Petition should be denied.

CONCLUSION

For the foregoing reasons, and because this case presents no issues worthy of Supreme Court review, Respondent Northbrook Property & Casualty Insurance Company respectfully requests that the Court deny the Petition.

Respectfully submitted,

ANTHONY R. ZELLE
Counsel of Record
GREGORY P. VARGA
ROBINSON & COLE, LLP
Attorneys for Respondent
One Boston Place
Boston, MA 02108-4404
(617) 557-5900